Supreme Court, U.S.
FILED

No. 94-851

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V., *Petitioner*,

v.

HIROKO SUGIMOTO, et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the first clause of the "commercial activities" exception to the Foreign Sovereign Immunities Act (28 U.S.C. § 1602 et seq.) authorizes a United States court to exercise jurisdiction over a claim brought by Japanese citizens against an agency of the Mexican Government, for the wrongful death of Japanese passengers in an airplane operated by an independent Mexican common carrier which crashed while on approach to a Mexican airport, based solely on the fact that because poor visibility conditions forced the plane to use an approach to the airport which briefly traversed over United States territory, the acts of the pilot which allegedly caused the crash occurred over United States airspace.

(2) Whether jurisdiction can be found to exist under the first clause of the "commercial activities" exception to the Foreign Sovereign Immunities Act based on the unexpected and unauthorized acts of an independent contractor.

(3) Where a finding of jurisdiction under the first clause of the "commercial activities" exception to the Foreign Sovereign Immunities Act has been made on an erroneous basis after an interlocutory appeal, can the Court of Appeals after trial find jurisdiction to exist on an entirely new basis that was not litigated before the District Court.

PARTIES TO THE PROCEEDING

The petitioner is EXPORTADORA DE SAL, S.A. DE C.V., a Mexican corporation owned in majority part by the Government of the United States of Mexico.

The respondents, who are citizens of Japan, are HIROKO SUGIMOTO, MITSUKUNI SUGIMOTO, YASUNOBU SUGIMOTO, KIMIKO KODANI, MAYUMI NUKIWA, KYOKO KODANI and KUNIKO OMACHI, individually and as guardian ad litem on behalf of ERI OMACHI, a minor.

RULE 29.1 LISTING

Petitioner EXPORTADORA DE SAL, S.A. DE C.V., is a foreign corporation, owned in majority part by the Government of the United States of Mexico, and has no parent corporation and no subsidiaries or affiliates which issue shares to the public.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

EXPORTADORA DE SAL, S.A. DE C.V., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this action.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 19 F.3d 1309 (Exhibit "B" to the concurrently filed Appendix, at pp. 2 to 11). The opinion of the District Court is unreported (Exhibit "C" to the Appendix, at pp. 12 to 87). An earlier opinion of the Court of Appeals, dealing with the jurisdiction issue on an interlocutory appeal, is reported at 930 F.2d 777 (Exhibit "D" to the Appendix, at pp. 88 to 103).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 25, 1994. The Court of Appeals denied a timely petition for rehearing on August 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

EXPORTADORA DE SAL, S.A. DE C.V., ("EXPORTADORA") is a Mexican corporation, owned in majority part by the Government of the United States of Mexico, and is therefore considered a "foreign state" for the purposes of the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. § 1602 et seq.). Pursuant to the FSIA, foreign states are presumptively immune from the jurisdiction of the United States courts. However, the court below held that EXPORTADORA was not entitled to immunity from jurisdiction under the FSIA, because of the operation of the "commercial activity" exception set forth in the first clause of 28 U.S.C. § 1605(a)(2). At issue here is the interpretation and application of that exception to foreign sovereign immunity. The first clause of 28 U.S.C. § 1605(a)(2), and other relevant provisions of the FSIA, are set forth in Appendix E (at pp. 104-105).

STATEMENT OF THE CASE

The instant litigation arises out of an airplane crash which resulted in the death of the pilot and the five passengers on board. The aircraft was owned by a certified Mexican common carrier, and was flown by a Mexican pilot. The flight had been contracted for by EXPORTADORA, a Mexican corporation whose majority shareholder is the Mexican Government. The plane was flying

from Guerrero Negro, Mexico, and was scheduled to land at Tijuana, Mexico.

Respondents are Japanese citizens, who are seeking damages for the death of three Japanese citizens who were passengers on the aircraft. Respondents claim that the pilot negligently operated the aircraft so as to cause it to be at an insufficient altitude as it approached the Tijuana airport, thereby causing the plane to crash.

The foregoing are the facts upon which respondents' claims against EXPORTADORA are based. However, the Court of Appeals has relied on one additional fact to find that the United States courts could properly assert jurisdiction over EXPORTADORA in this action. Specifically, when the alleged negligent acts were committed which caused the plane to crash, it was flying in United States airspace. As the plane flew into the vicinity of Tijuana, it encountered poor visibility conditions. Accordingly, the pilot used an alternate approach to the Tijuana airport which briefly swung over United States territory. While approaching the Tijuana airport, but while still a few miles north of the border, the plane crashed. It is upon this fortuitous connection with the United States that the Court of Appeals found jurisdiction to exist over an action brought by Japanese citizens against an agency of the Mexican Government.

A. FACTS

EXPORTADORA is a Mexican corporation, owned in majority part by the Mexican Government; its sole minority shareholder is the Mitsubishi Corporation of Japan. EXPORTADORA is engaged in the business of manufacturing and selling salt, and its principal place of business is located in Guerrero Negro, Baja California Sur, Mexico.

In September of 1987, Katsuo Sugimoto, Yoshihito Kodani and Hideo Omachi visited Guerrero Negro. Sugimoto and Kodani were professors of agriculture at the Tottori University in Hamasaka, Japan. With the cooperation of the Governments of Mexico and Japan, agricultural professors at the University were conducting a small agricultural experiment on land owned by the Mexican Government which is adjacent to EXPORTADORA's facilities, and Professors Sugimoto and Kodani wanted to visit that experiment. Omachi was a purchasing agent for the Asahi Chemical Company of Japan, who wished to tour EXPORTADORA's facilities in Guerrero Negro while he was on a previously scheduled business trip to other cities.

EXPORTADORA agreed to arrange for transportation to Guerrero Negro and back for Sugimoto, Kodani and Omachi. EXPORTADORA did so for Omachi as a courtesy; Sugimoto and Kodani were transported at the direction of the Mexican Government, pursuant to an agreement for technical cooperation between the governments of Mexico and Japan. No charge for the transportation arrangements was made to Sugimoto, Kodani or Omachi, or to their employers.

All of the actual decisions regarding the travel arrangements were made in Mexico and in Japan. However, some of the communications regarding those arrangements were made from a small office in San Diego, California, which EXPORTADORA maintains for the purpose of facilitating its purchase of equipment for its operations in Guerrero Negro. Employees of EXPORTADORA's San Diego office met Sugimoto, Kodani and Omachi in San Diego, and transported them via van to the Tijuana airport, from which they were flown to Guerrero Negro on EXPORTADORA's company plane.

Sugimoto, Kodani and Omachi all planned to leave Guerrero Negro on September 30, 1987. The company plane was

being used on that date for a Board of Directors meeting in Mexico City, so EXPORTADORA contracted with an independent commuter airline to make the flight from Guerrero Negro to Tijuana. The commuter airline selected was Aviones de Sonora ("Aviones"), a certified regional commuter airline for over 30 years, which had been licensed as a Mexican national commuter airline since 1979. Aviones was fully licensed and certified by the Government of Mexico to provide airline services, and it owned and operated ten aircraft. Aviones had an excellent reputation, and had experienced no serious accidents or fatalities. The District Court specifically found that Aviones was an independent contractor and a Mexican common carrier, and that "Exportadora, by selecting Aviones, provided a licensed, qualified and fully competent air taxi operator."

On the morning of September 30, 1987, shortly after 6:00 a.m., the Aviones flight left Guerrero Negro with Sugimoto, Kodani and Omachi on board.[1] The pilot of the Aviones flight had been instructed to fly to the Tijuana airport, and was told that if the weather conditions in Tijuana were unfavorable, he should fly on to Mexicali, Mexico. However, when the Aviones plane left Guerrero Negro, all of the available Mexican weather reports indicated the visibility and weather conditions in Tijuana would be favorable at the time planned for arrival.

Unfortunately, by the time the airplane came into the vicinity of Tijuana, the weather had changed, and zero visibility conditions existed at the airport. Although the pilot indicated that he wanted to fly on either to Mexicali or Tecate, the Tijuana air

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1 Also aboard the plane at that time were Ramon Schoenberg and Manuel Hernandez, who were developing a new business selling pumps, and had come to Guerrero Negro to solicit future sales of their product to EXPORTADORA. The survivors of Mr. Schoenberg and Mr. Hernandez settled out of this action prior to trial.

traffic controller encouraged the pilot to land in Tijuana. Because of the poor visibility conditions, the pilot was instructed to use an alternate approach to the airport. Specifically, a "Letter Agreement" between Mexican and United States aviation authorities authorized planes to use an approach in bad weather conditions which would swing over United States territory shortly before the landing at the Tijuana airport.

Following the air traffic controller's instructions, the pilot continued his approach to the airport. For reasons which are now unknown, and which never will be known, the plane failed to maintain sufficient altitude, and it crashed into the side of a hill located shortly before the beginning of the airstrip, a few miles north of the Mexico-United States border. All of the passengers on the airplane, and the pilot, died in the crash.

B. PROCEEDINGS BELOW

The survivors of Sugimoto, Kodani and Omachi, and of the other two passengers on the flight, brought wrongful death actions in the California state court and in the United States District Court. The state court actions were removed to the District Court pursuant to 28 U.S.C. 1441(d), which provides that any civil action brought in a state court "against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States..." The actions were then all consolidated in the District Court.

EXPORTADORA's first responsive pleading in the litigation was a motion to dismiss, on the ground that EXPORTADORA was immune from the District Court's jurisdiction because it is a "foreign state" for the purposes of the Foreign Sovereign Immunities Act. When the motion to dismiss was denied, EXPORTADORA appealed the District Court's order to the Ninth Circuit Court of Appeals. Thereafter, the Court of

Appeals issued its decision in Schoenberg v. Exportadora, 930 F.2d 777 (9th Cir. 1991) (Exhibit "D" to the Appendix), affirming the District Court's ruling that jurisdiction existed under an exception to the immunities provided by the FSIA, the first clause of 28 U.S.C. 1605(a)(2).

Trial commenced on January 11, 1993. On the first day of trial, the District Court ruled that it would not reconsider either the factual findings or the legal conclusions reached by the Court of Appeals in its prior determination of the jurisdiction issue. Closing argument was held on March 8, 1993, and shortly thereafter the District Court prepared its "Findings of Fact and Conclusions of Law" (Exhibit "C" to the Appendix). The District Court found that the crash was caused by the negligence of the Aviones pilot. The District Court also held that EXPORTADORA had vicarious liability for that negligence, because (1) it had breached a non-delegable implied covenant of non-negligent transportation; (2) it had breached a non-delegable tort duty to provide non-negligent transportation; and (3) it was estopped to deny Aviones' ostensible agency. Damages were awarded in the amount of $3,656,752.39, and judgment was entered on May 11, 1993.

EXPORTADORA filed a timely appeal from that judgment on May 12, 1993. The appeal challenged the District Court's rulings regarding pilot error and vicarious liability. Additionally, in the statement of jurisdiction contained in its opening brief, EXPORTADORA noted that shortly after the trial had ended, the Supreme Court issued its decision in Saudi Arabia v. Nelson, ___ U.S.___, 113 S.Ct. 1471, 123 L.Ed. 2d 47 (1993). EXPORTADORA argued that this new opinion of the Supreme Court established that the Ninth Circuit's decision on the interlocutory appeal had not applied the proper test for the existence of jurisdiction under the FSIA, and that using the proper test, jurisdiction did not exist. EXPORTADORA therefore requested the Court to reconsider the issue, and to allow

supplemental briefing regarding jurisdiction. On January 12, 1993, the Court of Appeals issued an order requesting the parties to file a "letter brief" addressing the issue of "whether there is jurisdiction in this case after Saudi Arabia v. Nelson..."

On March 25, 1994, the Ninth Circuit filed its decision affirming the District Court's judgment (Exhibit "B" to the Appendix). While not ruling on the merits of any of the specific theories of liability advanced by the District Court, the Ninth Circuit held that EXPORTADORA did have vicarious liability for the negligence of the Aviones pilot. Additionally, the Ninth Circuit held that the District Court properly asserted jurisdiction over EXPORTADORA pursuant to the "commercial activity" exception to the FSIA. Specifically, the court held that:

> According to Saudi Arabia, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. Id. at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space.

On April 8, 1994, EXPORTADORA filed a timely petition for rehearing, and a suggestion for rehearing en banc, with the Ninth Circuit Court of Appeals. In the petition, EXPORTADORA requested reconsideration of the holdings regarding vicarious liability, burden of proof, and jurisdiction. On May 3, 1994, the Ninth Circuit directed respondents to file a response to the petition for rehearing. On August 2, 1994, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc (Exhibit "A" to the Appendix).

REASONS FOR GRANTING THE PETITION

The doctrine of foreign state sovereign immunity was "judicially created to effectuate general notions of comity among nations..." First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762, 92 S.Ct. 1808 (1972). The FSIA was enacted to codify these "notions of comity," and to provide a nationwide and "'uniform body of law' concerning the amenability of a foreign sovereign to suit in the United States courts." First National City Bank v. Banco para el Commercio Exterior de Cuba, 462 U.S. 611, 622 n.11, 103 S.Ct. 2591 (1983).

The Ninth Circuit's decision in this case fails to respect the sovereignty of the Government of the United States of Mexico, and fails to promote uniformity of decision in this area of the law. Specifically, by allowing an action to be brought in the United States because of an insubstantial and fortuitous connection with this country, when in fact plaintiffs' claims are based on events which occurred in Mexico, the Ninth Circuit has improperly usurped the jurisdiction of the Mexican legal system. And, in so doing, the Ninth Circuit has departed from the holding of this Court, and of other Courts of Appeals, that jurisdiction under the first clause of the "commercial activities" exception can only be found where the plaintiff's claim is "based upon" commercial activities of the foreign sovereign in the United States which have a "substantial contact" with the United States.

As evidenced by the recent passage of the North American Free Trade Agreement, there will be increasing interactions between nations in the future, and in particular between the Governments of Mexico and the United States. It is therefore exceedingly important that this Court provide further guidance as to the jurisdictional reach of the United States courts in actions involving foreign sovereigns. This case presents an appropriate vehicle for such guidance, as the Ninth Circuit's decision

improperly expands the jurisdictional reach of the United States courts, and is erroneous.

A. THE COURT OF APPEALS' APPLICATION OF THE "COMMERCIAL ACTIVITY" EXCEPTION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

When the Court of Appeals first addressed EXPORTADORA's claim of foreign sovereign immunity, on the interlocutory appeal from the District Court's denial of EXPORTADORA's motion to dismiss, it held that jurisdiction existed under the first clause of 28 U.S.C. § 1605(a)(2). That first clause creates an exception to sovereign immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state..." The Court of Appeals held that EXPORTADORA's San Diego office had been involved in the travel arrangements related to decedents, and that this was "commercial activity" of EXPORTADORA which had a substantial contact with the United States. Accordingly, the Court of Appeals held that the District Court had jurisdiction over EXPORTADORA under the first clause of the "commercial activity" exception.

At the trial in this action, the District Court refused to reconsider the Court of Appeals' jurisdiction holding. However, after the District Court issued its decision in the case, this Court decided Saudi Arabia v. Nelson, ___ U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). In that case, the Supreme Court held that jurisdiction cannot be found to exist merely because the foreign state engaged in commercial activities which had a substantial contact with the United States. Rather, the Court held that the plaintiffs' action must also be "based upon" the commercial activities performed in the United States.

The Court of Appeals in its prior decision did not recognize or consider this "based upon" requirement. And, in

fact, the plaintiffs' action was not "based upon" the purported commercial activities which the Court had found were performed in the United States by EXPORTADORA. Consequently, in its brief on appeal, EXPORTADORA requested the Court of Appeals to reconsider its prior jurisdictional decision in light of Saudi Arabia v. Nelson, and requested permission to provide further briefing on the issue. The Court granted this request, and ordered the parties to provide supplemental briefing on the issue of jurisdiction.

In its subsequent decision, the Court of Appeals for the first time recognized the requirement that an action be "based upon" the commercial activity carried on in the United States by the foreign state. However, the Court did not (and indeed could not) hold that plaintiffs' action was "based upon" the San Diego office's communication of travel arrangements. Instead, the Court completely ignored its previous ruling, and found jurisdiction on an entirely different basis. That is, the Court held that EXPORTADORA was engaged in commercial activity within the United States when the Aviones plane flew into United States airspace, and that plaintiffs' claim was based on the tortious flying of that plane in United States airspace.

Both decisions of the Court of Appeals are incorrect, and both are in conflict with the decisions of this Court and other Courts of Appeals. The first decision completely overlooks the requirement that the plaintiffs' action be "based upon" the commercial activity of the foreign sovereign performed in the United States; the second decision ignores the requirement that the action be based upon commercial activity of the foreign sovereign which has a "substantial contact" with the United States.

1. The First Decision Fails To Support The Exercise of Jurisdiction Over EXPORTADORA

In its first jurisdiction decision, the Court of Appeals held that the exception to immunity set forth in the first clause of 28

U.S.C. § 1605(a)(2) was applicable. The Court held that:

> The FSIA requires two components for this exception to apply: (1) that the foreign entity be engaged in commercial activity, and (2) that the commercial activity have "substantial contact with the United States."

Appendix D, at p. 95.

The Court of Appeals held that these "two components" existed in this case. Specifically, the Court held that EXPORTADORA was engaged in "commercial activity" when it arranged for the decedents' transportation to Guerrero Negro and back (even though EXPORTADORA was not paid for this service). And, although the actual decisions regarding travel were all made in Mexico and Japan, the Court held that this "commercial activity" had a "substantial contact" with the United States because employees of EXPORTADORA's San Diego office were involved in communicating the travel arrangements, and picked up the decedents in San Diego to transport them to the Tijuana airport. The Court held that EXPORTADORA's San Diego office was "involved in arranging the trip, no matter where the decisions were made." Id. at 97, n.2. Accordingly, "[t]he fact that the transportation was arranged through the San Diego office and the trip began in that city provides a sufficient nexus with the United States." Id. at 98.

However, after the Court of Appeals' decision, this Court issued its decision in Saudi Arabia v. Nelson, establishing that the Court of Appeals completely overlooked an essential third requirement for finding jurisdiction under the first clause of section 1605(a)(2). Specifically, in Saudi Arabia v. Nelson, the Court clarified that in addition to the two requirements identified by the Court of Appeals, it must also be found that the plaintiffs' action

is "based upon" the commercial activities performed in the United States – the "action must be 'based upon' some 'commercial activity' by [defendant] that had 'substantial contact' with the United States..." Id. at 113 S.Ct. 1477. Observing that the term "based upon" is not defined in the FSIA, the Court stated:

> [T]he phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case. See Callejo v. Bancomer, S.A., 764 F.2d 1101, 1109 (CA5 1985) (focus should be on the "gravamen of the complaint"); accord, Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (CA7 1991) ("An action is based upon the elements that prove the claim, no more and no less")...

Id. at 113 S.Ct. 1477.

The Court in Saudi Arabia v. Nelson held that, while the plaintiffs' action had a "connection with, or relation to, commercial activity" of the defendant in the United States, and "these activities led to the conduct" which injured plaintiffs, the action was not "based upon" those activities. And, that being the case, jurisdiction did not exist under the first clause of the "commercial activities" exception.

The "commercial activity" in the United States which the Court of Appeals found to exist in the instant case was the nominal involvement of EXPORTADORA's San Diego office in communicating and facilitating the decedents' travel arrangements. However, while there was a "connection with, or relation to" the San Diego office's purported "commercial activity," plaintiffs' action was not in any sense "based upon" that activity.

The District Court found that EXPORTADORA's actual arrangement of transportation was in no way either negligent or in

breach of contract. Nothing improper or irregular occurred to the decedents in San Diego, or on their flight to Guerrero Negro. It is undisputed that the decision to use Aviones for the return flight was made in Guerrero Negro, and the District Court specifically found that "Exportadora, by selecting Aviones, provided a licensed, qualified and fully competent air taxi operator." The District Court also held that once the flight left Guerrero Negro, EXPORTADORA had no control over it.

In the complaint in effect when the interlocutory appeal was taken (and in the complaint in effect when trial commenced), the only claim for relief alleged against EXPORTADORA was for negligence. Specifically, it was alleged that EXPORTADORA, through its supposed agent or joint venturer, Aviones, negligently operated the plane so as to cause it to crash. Obviously, this alleged negligence had nothing to do with the San Diego office's communication of travel arrangements. Plaintiffs' claim was based upon the activities of the Aviones pilot on approach to the Tijuana airport, and not on EXPORTADORA's "commercial activities" in the United States. In other words, the activities by EXPORTADORA's San Diego office were not one of the "elements of a claim" for negligence. And, where the activities in the United States are "legally irrelevant to [the] right of recovery," the action is not based upon those activities. Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146 (D.C. Cir. 1994).

Consequently, the Court of Appeals decision unquestionably failed to satisfy the requirements for application of the "commercial activities" exception set forth in the first clause of section 1605(a)(2) – jurisdiction was being premised on activities of EXPORTADORA in the United States which were not the basis for plaintiffs' action. The Court of Appeals is in effect using a "minimum contacts" test for jurisdiction – if the foreign sovereign has had any "commercial" dealings in the United States which in

any way relate to the activities at issue in the litigation, jurisdiction exists.

However, in specifying that jurisdiction could only be found when the action was actually "based upon" those commercial activities, Congress made it clear that such "minimum contacts" would not suffice. That being the case, the Court of Appeals' first decision in this case provides absolutely no justification for the exercise of jurisdiction over EXPORTADORA. To the contrary, the Court of Appeals' decision is a dramatic expansion of jurisdiction over foreign sovereigns, which is contrary to both the Congressional intent embodied by the FSIA, and to this Court's holding in Saudi Arabia v. Nelson.

2. The Court of Appeals' Second Decision Also Fails To Support The Exercise of Jurisdiction Over EXPORTADORA

Because the Court of Appeals had specifically found that jurisdiction existed, the District Court at the trial in this action refused to allow further argument on the issue. Rather, the District Court held that the existence of jurisdiction over EXPORTADORA was the law of the case, and that the issue would not be revisited.

After trial, the District Court issued a judgment finding that the crash was the result of negligence on the part of the Aviones pilot. The District Court also held that EXPORTADORA was vicariously liable for that negligence, on three separate theories: (1) breach of an implied covenant of non-negligent transportation, (2) breach of a tort duty of non-negligent transportation, and (3) ostensible agency.

The decedents' travel to Guerrero Negro was accomplished without incident, and the District Court found that in arranging for the decedents' return flight on Aviones, EXPORTADORA

contracted with a "licensed, qualified and fully competent air taxi operator." Accordingly, the breach of the alleged contract and tort duties to provide non-negligent transportation did not occur until the plane crashed as an alleged result of the Aviones pilot's failure to maintain proper altitude on approach to the Tijuana airport. This purported negligence, occurring on a flight which had been contracted for in Mexico, and occurring long after the flight left Guerrero Negro, had absolutely no causal connection with the alleged commercial activities by EXPORTADORA's San Diego office. Indeed, according to plaintiffs, the San Diego office arranged for the decedents to return on a different plane, the EXPORTADORA company aircraft. Consequently, it is clear that liability for breach of an implied covenant or tort duty to provide non-negligent transportation was not "based upon" the purported commercial activities of EXPORTADORA in the United States.

The third basis of liability found by the District Court was ostensible agency. That is, the District Court found (without any actual evidence from plaintiffs on the issue) that the decedents may have believed that EXPORTADORA was performing the flight, or that Aviones was acting as EXPORTADORA's agent in performing the flight. That being the case, the District Court held that Aviones was EXPORTADORA's ostensible agent, and that EXPORTADORA was therefore responsible for the pilot's alleged negligence. However, the decision to contract with Aviones was undisputedly made in Mexico, long after the decedents had left San Diego. Consequently, any act or omission by EXPORTADORA which purportedly led the decedents to believe that Aviones was its agent occurred in Mexico. The ostensible agency theory of liability was not "based upon" EXPORTADORA's alleged commercial activities in the United States.

After the District Court made its determination, this Court issued its decision in Saudi Arabia v. Nelson, making it clear that, for jurisdiction to exist, the plaintiffs' claims must be "based upon"

commercial activity of the foreign sovereign in the United States. Consequently, in its brief on appeal, EXPORTADORA requested the Court of Appeals to reconsider the previous jurisdictional ruling, and requested permission to file supplemental briefing on the issue. The Court of Appeals thereafter ordered the parties to file a "Letter Brief" addressing the issue of "[w]hether there is jurisdiction in this case after Saudi Arabia v. Nelson..."

In its subsequent decision, the Court of Appeals revisited the issue of jurisdiction, and held that the "based upon" test emphasized in Saudi Arabia v. Nelson had been satisfied. In so doing, however, the Court of Appeals completely ignored the first Court of Appeals decision, and completely ignored the theories of liability advanced by the District Court. That is, the Court of Appeals did not find that jurisdiction existed because of the alleged "commercial activities" of EXPORTADORA's San Diego office, or that any of the three theories of liability found by the District Court were "based upon" those "commercial activities." Rather, the Court of Appeals simply held that:

> According to Saudi Arabia, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. Id. at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space. The jurisdictional requirement of the first clause of § 1605(a)(2) was met.

Appendix B, at p. 7.

As can be seen, the Court of Appeals in its decision has found an entirely new basis for jurisdiction, which was not argued

by the plaintiffs below, which was not relied on by the District Court, and which was not relied on by the Court of Appeals in its earlier decision. Jurisdiction has been held to exist because of the mere fortuitous circumstance that, on a two hour flight through Mexico, the plane happened to have crashed during the few minutes it was in United States airspace on approach to the Tijuana airport. EXPORTADORA respectfully submits that jurisdiction cannot be based on this coincidence.

a. Jurisdiction Cannot Be Based Upon The Activities Of An Independent Contractor

The District Court specifically found that Aviones was an "independent contractor." The District Court found that Aviones was a Mexican common carrier. The District Court found that Aviones was "licensed, qualified and fully competent." The District Court found that the flight at issue did not involve any "peculiar risk." And, the District Court held that EXPORTADORA had no control over the flight after it left Guerrero Negro.

In these circumstances, it makes no sense to hold that EXPORTADORA was engaged in commercial activity in the United States when the Aviones flight flew into United States airspace. Under both United States and Mexican law, Aviones and EXPORTADORA are separate entities. EXPORTADORA contracted for the flight in Guerrero Negro, and as soon as that flight left Guerrero Negro, EXPORTADORA had no more control over its activities. The brief intrusion into United States territory only occurred because of the poor visibility conditions in Tijuana, which required use of an approach, specified in a "Letter Agreement" between United States and Mexican aviation authorities, which briefly swung over United States territory. However, EXPORTADORA had specifically requested the pilot to fly on to another airport, located in Mexicali, Mexico, if he encountered poor weather in Tijuana.

Consequently, the flight's presence in United States airspace was not expected by EXPORTADORA, was not intended by EXPORTADORA, and was not even authorized by EXPORTADORA. That presence in United States airspace occurred when the flight was in the control of an independent contractor, which was also a common carrier.

While the propriety of the Court of Appeals' attribution to EXPORTADORA of the acts of an independent contractor in order to find jurisdiction would appear to be a question of first impression, analogous cases clearly establish that the Court of Appeals erred. Specifically, cases have held that jurisdiction over a foreign corporation cannot be based on the acts of a legally distinct foreign corporation, merely because they are both owned by the same foreign state. It therefore makes even less sense to hold that jurisdiction over a foreign government owned corporation can be based on the acts of a privately owned independent contractor.

In First National City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 626-627, 103 S.Ct. 2591 (1983), the Court held that "government instrumentalities established as judicial entities distinct and independent from their sovereign should normally be treated as such." Although that case was dealing with a determination of substantive liability, the Courts of Appeals have relied on this presumption of separation when making jurisdictional determinations under the FSIA involving the application of the "commercial activities" exception. See Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528, 533 (5th Cir. 1992), cert. den. 113 S.Ct. 413 (1992); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 446-447 (D.C. Cir. 1990); Hercaire Int'l, Inc. v. Argentina, 821 F.2d 559, 564-565 (11th Cir. 1987).

Most instructive in this regard is the recent decision in Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1993), cert. den. 114 S.Ct. 1644 (1994). The plaintiffs

in that case argued that jurisdiction should be asserted over a corporation owned by a foreign state, because that corporation was the parent of two subsidiaries which were engaged in commercial activity in the United States, and plaintiffs' action was based upon that commercial activity. The Court of Appeals reversed the District Court's determination. The Court first noted that the District Court's holding:

> [V]iolates the important principle that the acts of separate corporations established by foreign governments should not be attributed to related foreign entities unless doing so would 'work fraud or injustice.'

Id. at 1286. The Court then held that:

> [A] district court cannot exercise jurisdiction over a foreign state under the first clause of the FSIA commercial activity exception unless it finds a sufficient jurisdictional connection or nexus between the commercial activity engaged in by that particular foreign entity and the United States.

Id. at 1287 (emphasis added).

Here, the Court of Appeals' finding of jurisdiction was not based upon any acts of EXPORTADORA which were conducted in the United States. Rather, jurisdiction was found by attributing to EXPORTADORA the brief, unexpected and unauthorized commercial activities of Aviones in the United States. And, the District Court specifically held that Aviones was a common carrier, and was a licensed, qualified and competent independent contractor. No "fraud or injustice" would result if Aviones' separate legal identity is respected; but an improper expansion of jurisdiction is accomplished if that separate identity is ignored.

Further, allowing jurisdiction to be based on vicarious

liability for the acts of independent contractors defeats one of the primary purposes of the FSIA, the development of "'a uniform body of law' concerning the amenability of a foreign sovereign to suit in the United States courts." First National City Bank v. Banco para el Commercio Exterior de Cuba, 462 U.S. 611, 622 n.11, 103 S.Ct. 2591 (1983). In this case, the Ninth Circuit relied on California law to find that EXPORTADORA was vicariously liable for the Aviones flight. The use of a test for jurisdiction which will vary from state to state obviously precludes the development of a "uniform body of law." It is respectfully submitted that the goal of achieving a "uniform body of law" under the FSIA is best served by reversing the Ninth Circuit's decision, and holding that jurisdiction cannot be imposed based on the acts of an independent contractor.

b. The Alleged Commercial Activity Did Not Have A Substantial Contact With The United States

Even if it is assumed that EXPORTADORA was somehow engaged in "commercial activity" in the United States because the Aviones plane was briefly flying in United States airspace, that activity still does not suffice to create jurisdiction. This is because the alleged "commercial activity" did not have a "substantial contact" with the United States.

The Court of Appeals held that "according to Saudi Arabia, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States." As it did in its first decision, however, the Court of Appeals has omitted one (albeit a different one) of the requirements elucidated in Saudi Arabia v. Nelson – that the commercial activity upon which the action is based must have some "substantial contact" with the United States. Or, as stated in Saudi Arabia v. Nelson, the "action must be 'based upon' some 'commercial activity' by [defendant] that had 'substantial contact' with the United States."

113 S.Ct. at 1477 (emphasis added). And, here, the commercial activity held to exist by the Court of Appeals did not have a substantial contact with the United States.

Assuming that the Aviones flight could be considered "commercial activity" of EXPORTADORA[2/], it is still undisputed that the flight was contracted with to fly from an airport in Guerrero Negro, Mexico, to an airport in Tijuana, Mexico. There was no expectation or intent that the flight would at any time have any contact with the United States, let alone fly into United States airspace. After the flight had left Guerrero Negro, and long after it was beyond any control of EXPORTADORA, the Aviones pilot encountered bad visibility conditions in Tijuana, and therefore used the poor weather approach authorized pursuant to a "Letter Agreement" between the United States and Mexican Governments. In so doing, the pilot neglected to follow EXPORTADORA's instruction that, should poor weather conditions be encountered in Tijuana, he should fly on to the airport in Mexicali, Mexico.

Accordingly, the planes' unexpected, unintended, unauthorized, and brief swing over United States' airspace cannot be considered a commercial activity of EXPORTADORA which had a substantial contact with the United States. While the alleged negligence of the pilot was committed during the few minutes the plane was over U.S. territory, and the plane actually crashed in

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2/ Of course, EXPORTADORA does not concede that the Aviones flight can properly be considered a "commercial activity" of EXPORTADORA. It received no payment for the flight from any of the decedents, or from anyone else. As has been held in the Second Circuit, the test for "commercial activity" is "whether the activity is of the type an individual would customarily carry on for profit." Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984). While the Court of Appeals in its first decision held that EXPORTADORA might indirectly profit as a result of goodwill, such a motive for what was on its face a nonprofit flight cannot be used to create jurisdiction. Aschenbrenner v. Conseil Regional de Haute-Normandie, 851 F.Supp. 580, 585 (S.D.N.Y. 1994).

United States territory, this was nothing more than a fortuity. Other than its physical presence in United States airspace, the flight, and the crash thereof, had absolutely nothing to do with the United States. Indeed, the Ninth Circuit's test for jurisdiction turns on nothing more than the vagaries of the weather -- if the weather had been good in Tijuana, the flight would never have entered United States airspace. That being the case, it simply cannot be held that the mere presence of the flight over United States airspace, for a few minutes out of a two-hour trip, constituted a "substantial contact" with the United States. And, that being the case, jurisdiction cannot be exercised over EXPORTADORA on that basis.

To hold to the contrary creates the possibility of even more dramatic intrusions into the affairs of foreign governments. Given the reasoning of the Ninth Circuit in this case, jurisdiction could be asserted over claims arising out of any crash of a foreign sovereign owned or operated flight to the Tijuana airport, whether it departed from Mexico City or Moscow, solely because a negligent act of the pilot occurred while the plane was still north of the border during its approach to the Tijuana airport. Certainly, there would be no justification for an assertion of jurisdiction by the United States courts over claims against a foreign government by foreign citizens who were the survivors of foreign passengers on such a flight. However, if the mere fortuitous circumstance that the alleged negligent acts of the Aviones pilot occurred while over United States airspace is sufficient to establish jurisdiction, then there is no reason to deny jurisdiction over the claims of any foreign citizens arising out of negligent acts committed while in United States airspace.

This is a result which the Congress intended to avoid by enactment of the Foreign Sovereign Immunities Act. It is respectfully submitted that the Ninth Circuit Court of Appeals has twice attempted to unduly expand the reach of the first clause of the "commercial activities" exception to the FSIA, first by ignoring the requirement that the plaintiffs' action be "based upon"

commercial activities of the foreign sovereign in the United States, and then by ignoring the requirement that those commercial activities must have a substantial contact with the United States. Because both decisions are erroneous, and are contrary to the decisions of this Court, the instant petition should be granted.

c. The Court of Appeals' Post-Trial Determination Of The Basis For Jurisdiction Violates The Requirements Of The FSIA

As explained previously, the Court of Appeals in its interlocutory decision found jurisdiction to exist because EXPORTADORA was allegedly engaged in commercial activities in the United States when it helped facilitate the decedents' travel arrangements through its San Diego office. At trial, the District Court relied on the validity of that determination, and would not entertain any further argument regarding jurisdiction.

In its second decision on appeal, the Ninth Circuit completely ignored this jurisdictional finding, and held that jurisdiction existed because plaintiffs' action was based upon the "commercial activity" which occurred when the Aviones plane flew in United States airspace. This post-trial determination of a new basis for the jurisdictional ruling, after EXPORTADORA had been denied the opportunity to contest jurisdiction at trial, was a deprivation of EXPORTADORA's due process rights. Equally important, the Ninth Circuit's post-trial determination of the factual basis for jurisdiction thwarts one of the principal purposes of the FSIA, and contradicts established precedent that the determination of jurisdiction must be made as a preliminary matter, at the outset of the case.

It is settled that "sovereign immunity is an immunity from trial and the attendant burdens of litigation," and is "not just a defense to liability on the merits." Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic, 877 F.2d 574, 576 n.2 (7th

Cir. 1989), cert. den. 493 U.S. 937 (1989). See also United States v. Moats, 961 F.2d 1198, 1201 (5th Cir. 1992) ("the purpose behind collateral order appeals from denials of FSIA immunity is to effectuate the guarantee that immune parties will not become embroiled in litigation"). Given this purpose, it is the rule that sovereign immunity is a "critical preliminary determination." Federal Ins. Co. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1284 n.11 (3d Cir. 1993). "[P]roviding review only after trial would destroy the 'legal and practical value' of [the] sovereign immunity defense." Id. at p. 1282.

In the instant case, a "preliminary determination" of jurisdiction was made in the Court of Appeals' initial decision, but that decision was erroneous. The Court of Appeals' second decision was also erroneous, but additionally was based on findings which could only have been made after trial -- that despite Aviones' status as an independent contractor and licensed common carrier, EXPORTADORA still had vicarious liability for the Aviones flight. Although acknowledging that Aviones was indeed an independent contractor, the Court held that EXPORTADORA was still liable based on a general policies of California law, looking at such factors as "the party primarily to be benefited," who selected the contractor, whether the contractor was financially responsible and had insurance, etc.[2] These factors were not specifically litigated at trial, nor relied upon by the Court of Appeals in its previous decision.

By completely changing the basis for its jurisdictional determination, the Court of Appeals implicitly concluded that its prior decision was erroneous. However, the Court of Appeals'

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[2] It is ironic to note that, at least by the standards in effect in Mexico, Aviones most certainly was financially responsible, and was fully insured (its carrier paid benefits to the decedents' families). Only when judged by United States standards could Aviones be seen as lacking in its capitalization or insurance. And, given the lack of any legitimate basis for jurisdiction, United States standards should not be applied.

reliance upon a new basis which could not have been established prior to trial deprived EXPORTADORA of its right to a "preliminary determination" of jurisdiction. For this reason too, the Ninth Circuit's decision is erroneous.

B. ALLEGED ALTERNATIVE THEORIES OF JURISDICTION CANNOT BE CONSIDERED AT THIS TIME.

The assertion of jurisdiction by the District Court, and the jurisdictional determinations in both Court of Appeals decisions, were based exclusively on the first clause of 28 U.S.C. § 1605(a)(2). However, plaintiffs have at different times alleged alternative grounds for jurisdiction -- the second and third clauses of § 1605(a)(2), and the non-commercial torts exception set forth in 1605(a)(5). Also, while the appeal from the judgment was pending, plaintiffs argued for the first time that jurisdiction could be found pursuant to the waiver exception set forth in 28 U.S.C. § 1605(a)(1).

It is foreseeable that plaintiffs in their opposition to this petition will argue that, even though jurisdiction cannot properly be found the first clause of section 1605(a)(2), it can still be found under one of these alternative grounds. In fact, none of these exceptions to sovereign immunity are applicable. However, and equally important, these alternative bases for jurisdiction cannot now be considered, as they were not considered or relied upon by any of the courts below, and were not raised in the Pretrial Order.

As noted, the only basis for jurisdiction considered by the courts below was the applicability of the exception set forth in the first clause of 28 U.S.C. § 1605(a)(2). And, because the District Court ruled on the first day of trial that it would not reconsider the jurisdictional determination, EXPORTADORA did not put on evidence regarding jurisdiction, including facts showing the inapplicability of alternative bases of jurisdiction.

It is a well-settled principle of appellate jurisprudence that review is limited to those issues decided by the courts below, and this principle has been applied in cases decided under the FSIA. See Republic of Argentina v. Weltover, ___ U.S. ___, 112 S.Ct. 2160, 2164, 119 L.Ed.2d 394, 403 (1992) (limiting the issue on appeal to the third clause of § 1605(a)(2), which was the only clause relied on in the proceedings below); Federal Insurance Co. v. Richard I. Rubin & Co., supra, 12 F.3d at 1277 n.2 (declining "the parties' invitation to address whether the district court could exercise jurisdiction under the FSIA non-commercial tort exception because the district court failed to rule on the applicability of this exception..."). Consequently, EXPORTADORA would respectfully submit that the alternative bases for jurisdiction argued by plaintiffs are not ripe for consideration at this time. And, because these alternative bases for jurisdiction were not specifically raised in the Pretrial Order, plaintiffs are barred from subsequently raising them. Fed. R. Civ. P. 16(e); Higgins v. Gates Rubber Co., 578 F.2d 281 (10th Cir. 1978).

However, given the emphasis which plaintiffs have been giving this argument in proceedings before the Court of Appeals, EXPORTADORA believes it necessary to address one of the specific alternative grounds for jurisdiction argued by plaintiffs, the "waiver" exception set forth in 28 U.S.C. § 1605(a)(1). This exception was not alleged in plaintiffs' complaint, was not in the Pretrial Order, was not raised in the District Court, and was not ruled on by any of the courts considering the jurisdiction issue.

Plaintiffs' waiver argument is based on the fact that at trial, EXPORTADORA did not contest the issue of jurisdiction. However, this decision not to contest the issue was not the result of an intent to waive jurisdiction, but instead was in deference to the District Court's specific ruling, on the first day of trial, that it would not reconsider the prior jurisdiction determination. EXPORTADORA immediately filed a supplemental memorandum on the second day of trial, arguing that the District Court was not bound by the factual findings made in support of the prior

decision, but the District Court refused to change its ruling. Thereafter, the District Court affirmed on a number of occasions that it would not reconsider the jurisdiction issue.

> THE COURT: We passed that long ago. I advised both counsel that we are not reviewing the facts and findings relied upon by the Court of Appeals in order to arrive at its legal rulings that courts of the United States have jurisdiction over this matter – both over the parties and subject matter and that issue will not be revisited...

In light of the District Court's ruling, EXPORTADORA conceded only that because the Court of Appeals had previously held on interlocutory appeal that jurisdiction existed, and because the District Court would not reconsider that issue, EXPORTADORA's counsel would not proffer evidence at trial regarding the absence of jurisdiction.

However, until the District Court's ruling, EXPORTADORA had contested jurisdiction at every available opportunity. The first responsive pleading to plaintiffs' complaint was a motion to dismiss, arguing that EXPORTADORA was immune from the District Court's jurisdiction because of its status as a "foreign state" for the purposes of the FSIA. When that motion to dismiss was denied by the District Court, EXPORTADORA appealed the order to the Court of Appeals. While the appeal was still pending, EXPORTADORA filed its first answer to the complaint, and the first affirmative defense alleged in that answer was that the District Court "lacks subject matter jurisdiction over each and every claim alleged against EXPORTADORA." Further, all of EXPORTADORA's answers to plaintiffs' subsequent amended complaints specifically raised, as the first affirmative defense, the District Court's lack of subject matter jurisdiction over EXPORTADORA.

The pretrial order filed with the District Court in this case

lists subject matter jurisdiction as the first issue of fact to be litigated, and as the first issue of law to be litigated. And, after trial, EXPORTADORA specifically requested reconsideration of the prior jurisdictional ruling in its opening brief on appeal, and filed a "Letter Brief" on the jurisdiction issue. Finally, after the Court of Appeals' decision, EXPORTADORA filed a petition for rehearing, seeking reconsideration of the jurisdictional determination.

"[C]ourts rarely find that a nation has waived its sovereign immunity without strong evidence that this is what the foreign state intended." Rodriguez v. Transnave, Inc., 8 F.3d 284, 287 (5th Cir. 1993). Obviously, EXPORTADORA, by its consistent challenge to jurisdiction, has in no way evidenced an intent to waive its immunity. And, "Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly." Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991); Drexel Burnham Lambert v. Committee of Receivers, 12 F.3d 317, 324-326 (2d Cir. 1993) (no waiver where defendant filed a motion to dismiss for lack of jurisdiction).

While EXPORTADORA did not contest jurisdiction at trial, this was only because the District Court specifically ruled that it would not entertain argument on that issue. It simply cannot reasonably be disputed that EXPORTADORA never intended to waive its right to assert sovereign immunity on appeal, and a finding of jurisdiction cannot be made on that ground.

CONCLUSION

Plaintiffs' action was based on events which occurred in Mexico. That is the country where the travel arrangements were made, that is the country where Aviones was contracted with, and that is the country where the flight both departed from and was to land in. To hold that sovereign immunity can be vitiated solely because of a momentary, unexpected nexus with the United States,

leaves open the possibility of a dramatic expansion of the jurisdictional reach of the United States courts over foreign sovereigns. Such an expansion of jurisdiction is not in keeping with the Congressional intent evidenced by the Foreign Sovereign Immunities Act, and is not in keeping with the Supreme Court's decision in Saudi Arabia v. Nelson; indeed, it is patently disrespectful of the laws of the Government of Mexico. That being the case, petitioner EXPORTADORA requests that this Court grant the instant petition for a writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: October 6, 1994

GRECO & TRAFICANTE

By: _____
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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. ____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V., *Petitioner*,

v.

HIROKO SUGIMOTO, et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Order Denying Petition For Rehearing
Court of Appeals
August 2, 1994

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HIROKO SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; ERI OMACHI; KUNIKO OMACHI,	)	No. 93-55716
	)	DC No. CV-88-01532-JMF
Plaintiff-Appellees,	)	ORDER
	)	Filed: August 2, 1994
vs.	)	
EXPORTADORA DE SAL, S.A. DE C.V.,	)	
Defendant-Appellant.	)	

Before: TANG, PREGERSON and NOONAN, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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APPENDIX B

Opinion
Court Of Appeals
March 25, 1994

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HIROKO SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; ERI OMACHI; KUNIKO OMACHI, *Plaintiffs-Appellees,* v. EXPORTADORA DE SAL, S.A. DE C.V., *Defendant-Appellant.*	No. 93-55716 D.C. No. CV-88-01532-JMF OPINION

On Appeal from the United States District Court
for the Southern District of California
James M. Fitzgerald, District Judge, Presiding

Argued and Submitted
February 1, 1994—Pasadena, California

Filed March 25, 1994

Before: Thomas Tang, Harry Pregerson and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Torts/Negligence/Aviation

The court of appeals affirmed a district court judgment. The court held that under California law, a defendant was liable for the negligence of an independent contractor whom it hired to fly three visitors from its company town.

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Appellant Exportadora De Sal, S.A. De C.V. manufactures salt in a company town in Guerrero Negro, Mexico. An employee of Mitsubishi Corporation of Japan, which owns 49 percent of Exportadora, asked Exportadora to provide transportation for Hideo Omachi to Guerrero Negro by car and company plane. Mitsubishi pointed out to Exportadora that Omachi was a manager for one of Exportadora's most important Japanese customers. Exportadora's van transported Omachi from San Diego to Tijuana. Omachi was transported by company plane to Guerrero Negro.

Mitsubishi also asked Exportadora to arrange for transportation to Guerrero Negro for Katsuo Sugimoto and Yoshihito Kodani, professors who were interested in an agricultural project at Guerrero Negro. A representative of Exportadora met Sugimoto and Kodani in San Diego, and had them transported to the Tijuana airport, from which they flew in a company plane to Guerrero Negro.

In Guerrero Negro, Omachi, Sugimoto and Kodani were fed in Exportadora's company dining room, and housed at Exportadora's guest quarters. Because the company plane was not available on the scheduled date to return Omachi, Sugimoto and Kodani to Tijuana, an Exportadora employee chartered an air taxi company to carry the passengers from Guerrero Negro to Tijuana.

The pilot of the air taxi crashed into a hill, and the plane fell on American soil. The pilot, Omachi, Sugimoto and Kodani were killed.

Appellees, Sugimoto's, Kodani's and Omachi's survivors, brought a wrongful death action against Exportadora. Exportadora challenged the district court's jurisdiction on the ground of sovereign immunity. The court held that it had jurisdiction. Exportadora appealed.

The court of appeals held that in transporting the passengers, Exportadora engaged in commercial activity in the

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United States, and so fell within one of the exceptions of the Foreign Sovereign Immunities Act. On remand, the district court found that the crash was due to the pilot's negligence, and found Exportadora liable.

Exportadora appealed, challenging the district court's jurisdiction. Exportadora also contended that it should not have been held liable for the pilot's negligence when the pilot was the employee of the air taxi, an independent contractor.

[1] Jurisdiction existed. [2] Exportadora was engaged in commercial activity within the United States when the air taxi flew in the United States air space. An element of the plaintiffs' claim consisted of the tortious flying of the plane in United States air space.

[3] In addition, as a matter of California law, Exportadora was liable for the tortious performance of the pilot. Exportadora controlled the transportation offered to business visitors to its plant and company town; Exportadora decided whether visitors from abroad were welcome, approved them, arranged for their transportation, paid all the expenses, fed them, and determined where they would stay and how they would come and how they would go.

COUNSEL

Clyde Greco, Jr., Greco & Traficante, San Diego, California, for the defendant-appellant.

Robin Foor, Belmont, California, for the plaintiffs-appellees.

OPINION

NOONAN, Circuit Judge:

Exportadora De Sal, S.A. De C.V. (Exportadora) appeals from the judgment entered after a bench trial in a wrongful

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death action brought by the survivors of Katsuo Sugimoto, Yoshihito Kodani and Hideo Omachi (the plaintiffs). We have jurisdiction under 28 U.S.C. § 1330, and affirm.

FACTS

Exportadora is a manufacturer of salt owned 51 percent by the government of Mexico and 49 percent by Mitsubishi Corporation of Japan. Exportadora is a major producer of salt, which it markets internationally. It has a manufactory of salt at Guerrero Negro, Mexico. The plant is located in a company town. The most convenient city in proximity to Guerrero Negro is San Diego, California. Exportadora maintained an office in San Diego.

It is possible to get to Guerrero Negro from San Diego by bus, but the only convenient way of getting there is by Exportadora arranging a flight from Tijuana, Mexico to Guerrero Negro. For visitors to Guerrero Negro accepted by Exportadora, the practice was for the company to send a van to its San Diego office to transport them to the Tijuana airport. There was no telephone at the plant and it communicated with outside parties by telex to the San Diego office.

On September 4, 1987 an employee of Mitsubishi asked Exportadora to provide transportation for Omachi to Guerrero Negro by car and company plane. Mitsubishi's telex noted that Omachi was a manager for Asashi, one of Exportadora's most important Japanese customers. A second telex from Mitsubishi to Exportadora stated, "We hope that your beautiful explanation and arrangements will charm him very much." A third telex thanked Exportadora for accepting "Omachi's visit to G.N."

On September 18, 1987 Mitsubishi asked Exportadora to arrange for transportation to Guerrero Negro for Sugimoto and Kodani by pick-up truck and company plane. Sugimoto and Kodani were professors of Tottori University in Japan

and were interested in an agricultural project at Guerrero Negro. On September 22 Sugimoto and Kodani arrived by air in San Diego and were met by a representative of Exportadora, who arranged for their overnight stay in San Diego. The following day Exportadora had them transported to the Tijuana airport from which they flew in the company plane to Guerrero Negro. The company prepared a schedule showing that they would return to Tijuana on September 30.

On September 27 Omachi arrived at San Diego and on the following day was transported by Exportadora's van to Tijuana and by company plane to Guerrero Negro. His return was also scheduled for September 30. In Guerrero Negro Omachi, Sugimoto and Kodani were fed in the Exportadora company dining room and were housed without charge at Exportadora's guest quarters.

The company plane was not available on September 30 because of a directors' meeting. An Exportadora employee chartered an air taxi company to carry the scheduled passengers from Guerrero Negro to Tijuana.

Flying in heavy fog on the morning of September 30 in air space of the United States, the pilot of the air taxi crashed into a hill outside of Tijuana and fell on American soil. The district court found the crash due to the pilot's negligence in descending below the proper glide path and in not executing a missed approach when required to do so.

The crash killed the pilot and the passengers.

PROCEEDINGS

The plaintiffs brought suit against Exportadora. Exportadora challenged the jurisdiction of the district court on the ground of its sovereign immunity under 28 U.S.C. §§ 1603(a), (b)(2) and when the district court held it had jurisdiction, Exportadora appealed to this court. We held that in transport-

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ing Omachi, Sugimoto and Kodani Exportadora had been engaged in commercial activity in the United States and so fell within one of the exceptions of the Foreign Sovereign Immunities Act, *viz.* "the action is based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. § 1605(a)(2). *Schoenberg v. Exportadora*, 930 F.2d 777 (9th Cir. 1991). We found the commercial activity to lie in Exportadora's "arranging transportation for its prospective business partners" in the case of Omachi and appeasing the Mexican government in the case of the transportation provided to Sugimoto and Kodani. *Id.* at 780.

On remand, a bench trial was held in which the district court found Exportadora liable on the basis of several theories of liability. Exportadora appeals.

ANALYSIS

Jurisdiction

[1] Exportadora raises again the question as to jurisdiction, contending that despite *Schoenberg*, the issue remains open in the light of *Saudi Arabia v. Nelson*, 113 S.Ct. 1471 (1993). The plaintiffs argue that Exportadora waived jurisdiction after the decision in this court in *Schoenberg*. We need not address that argument, because we hold that under the precise test set by *Saudi Arabia* jurisdiction exists.

[2] According to *Saudi Arabia*, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. *Id.* at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space. The jurisdictional requirement of the first clause of § 1605(a)(2) was met.

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Tortious Conduct

On appeal Exportadora argues that the district court found pilot negligence by indulging the presumption that if the plane hit a hill in the fog, the failure must have been the pilot's. On the contrary, the district court eliminated a variety of other possible causes of the crash and relied on the opinion of an aviation accident investigator whom it found credible and reliable. There was no clear error in the district court's conclusion that it was a negligent mistake by the pilot that was the cause of the accident.

Basis for Liability

Exportadora presses that it should not be held liable for the pilot's negligence when the pilot was the employee of the air taxi, which the district court characterized as "an independent contractor." The general rule is clear that one is not liable for the tortious acts of an independent contractor. The rule is riddled with exceptions so that there is "only a small area in which the so-called general rule operates." 6 Witkin, *Summary of California Law* § 1009 (1987). California law in this respect is in harmony with the *Restatement (Second) of Torts* § 409, comment b, which states that the rule "can now be said to be general only in the sense that it is applied when no good reason is found for departing from it."

[3] Here there is good reason for departing from the already-eroded rule. Exportadora controlled the transportation offered to business visitors to its plant and company town. Exportadora decided whether visitors from abroad were welcome, approved them, arranged for their transportation, paid all the expenses, fed them, determined where they would stay and how they would come and how they would go. It would be unconscionable to permit Exportadora to insulate itself from liability for negligence by providing the transportation for which it was responsible through an air taxi which carried piteously small amounts of insurance per passenger. As a mat-

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ter of California law Exportadora was liable for the tortious performance of the pilot.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HIROKO SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; ERI OMACHI; KUNIKO OMACHI,	)	No. 93-55716
	)	DC No. CV-88-01532-JMF
Plaintiff-Appellees,	)	ORDER AMENDING OPINION
vs.	)	
EXPORTADORA DE SAL, S.A. DE C.V.,	)	
Defendant-Appellant.	)	

Filed: July 1, 1994

Before: TANG, PREGERSON and NOONAN, Circuit Judges

The opinion filed on March 25, 1994 is amended as follows: At slip op. page 2893, 5 lines from the bottom, strike the sentence beginning "It would be . . ." and replace it with the following:

> Exportadora remains liable for the enterprise, although the air taxi was an independent taxi: "the enterprise, notwithstanding the employment of the independent contractor, remains, the

employer's" when it "is the party primarily to be benefited . . . selects the contractor . . . is free to insist upon one who is financially responsible, and to demand indemnity from him, [and] the insurance necessary to distribute the risk is properly a cost of the employer's business." Van Arsdale v. Hollinger, 68 Cal.2d 245, 253; 437 P.2d 508, 513 (1968).

APPENDIX C

Transcript Of Findings And Conclusions
Before The Honorable James M. Fitzgerald
United States District Judge
March 9, 1993

SAN DIEGO, CALIFORNIA TUESDAY, MARCH 9, 1993

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(Call to order of the Court.)

THE COURT: We're here this morning in the case of Sugimoto and others vs. Exportadora de Sal, 88-1532. I'm going to begin this morning to place on the record my findings of fact and conclusions of law. The findings and conclusions will be largely taken from the notes which I have made up during the trial of the case and from our investigation of the legal issues which have been raised in the course of the trial.

The findings and conclusions which I now place of record will be my decision in the case. I do not intend to enter a formal decision.

The court recorder will prepare a transcript, and the transcript will be made part of the official record in the case and will reflect my decision.

Upon the completion of the transcript, the court recorder will notify the parties who I have requested to make arrangements with the court recorder so that they may order out the transcripts.

An additional copy of the transcript will be provided to Judge John Rhoades who has had the responsibility for the management of the case, and I would like a copy sent to my chambers in the U.S. District Court for the District of Alaska so that I may address any post-trial applications or motions made by the parties.

I shall now begin with the findings, and I will request that the findings and conclusions be entered in the transcript by identifying each of the findings and conclusions by number and that each of the findings and conclusions begin after a double space.

FINDINGS

(1) The claimants in this litigation are the survivors of

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Doctor Katsuo Sugimoto, Doctor Yoshihito Kodani and Mr. Hideo Omachi who, until the time of their deaths on September 30, 1987, were citizens and residents of Japan. Doctor Sugimoto and Doctor Kodani were at the time of their deaths professors of agriculture at Tottori University in Hamasaka, Japan.

For about five years prior to September 30, 1987, Tottori University had been involved in an agricultural project located in Guerrero Negro, Baja California, Mexico. Mr. Omachi was at the time of his death the manager of the raw materials section of the purchasing department of Asahi Chemical Industrial Company.

(2) The Defendant in the present litigation is Exportadora de Sal, a corporation formed under the laws of Mexico which is 51 percent owned by the United Mexican States and 49 percent owned by Mitsubishi Corporation of Japan. Exportadora manufactures salt from seawater at Guerrero Negro and sells the product in domestic and international markets. Exportadora is one of the world's largest producers of industrial salt producing about six million metric tons each year.

Asahi Chemical is said to be one of Exportadora's most important customers for salt. Mr. Omachi had arranged to visit and inspect Exportadora's facilities.

(3) From 1974 until 1991, Exportadora maintained an office at San Diego, California which was connected by telex with Exportadora's offices at Guerrero Negro and Mexico City. The San Diego office was heavily involved in purchasing, shipping and transporting materials for Exportadora's business and, to some extent, operated as a communication center with Mitsubishi in Japan.

(4) In Schoenberg vs. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991), the Court of Appeals resolved jurisdictional and choice-of-law issues raised by Exportadora on an appeal taken from the rulings of the District Court. In its opinion, the Court of Appeals set out the underlying facts leading up to the present litigation with clarity and precision, and I quote:

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"Exportadora is a corporation which produces salt in Mexico. The Mexican government owns 51 percent of the corporation, and the Mitsubishi Corporation of Japan owns the remainder. Exportadora maintained an office in San Diego which communicated with outside parties on behalf of the Exportadora plant in Guerrero Negro, Mexico because the plant had no telephone services. In September 1987, five relatives of the Plaintiffs traveled from San Diego to Exportadora's Guerrero Negro facility. Exportadora drove them form San Diego to the Tijuana airport and then flew them from there to Guerrero Negro on its own airplane. For the return trip, Exportadora's plane was unavailable. It chartered another plane from Aviones de Sonora, S.A., a Mexican corporation, to fly the travelers back from Guerrero Negro to Tijuana.

On that flight back, fog at Tijuana necessitated an instrument landing approach to the Tijuana airport. Such an approach requires the airplane to fly into United States air space in order to land from the west. The plane failed to maintain a sufficient altitude and crashed short of the Tijuana airport in United States territory near the Mexican border, killing all aboard. The Plaintiffs in this action are the survivors.

The five travelers made the trip to Guerrero Negro for different purposes. Ramon Schoenberg and Manuel Hernandez, both California residents, worked for a pump manufacturer and traveled to Guerrero Negro to solicit business. Hideo Omachi, a resident of Japan, was a purchasing agent for a Japanese company. Katsuo Sugimoto and Yoshihito

> Kodani, also residents of Japan, were representatives of Tottori University in Japan and were visiting an agricultural experiment in Guerrero Negro adjacent to Exportadora's salt production facility."

(5) Former U.S. District Judge J. Lawrence Irving entered findings that Exportadora arranged transportation of the decedents between Guerrero Negro and San Diego and transported them. On review, the Ninth Circuit held the District Court did not clearly err in making this finding. Continuing the opinion, the court held that, quote:

> "Exportadora engaged in commercial activity in arranging transportation for its prospective business partners, Schoenberg, Hernandez and Omachi, bringing them to Guerrero Negro facilitated potential commercial dealings. As for the university representatives Sugimoto and Kodani, Exportadora arranged transportation for them at the behest of its majority stockholder, the Mexican government. Appeasing one's majority stockholder is an activity that a private entity can perform and benefits future commercial dealings in other contexts by maintaining good will."

(6) The District Court also found that Exportadora maintained a regular air and auto link between its San Diego and Guerrero Negro offices as part of its commercial operations, that it arranged through its San Diego office round-trip transportation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego.

On review, the Court of Appeals upheld findings of the District Court. Moreover, the court upheld the conclusion of the District Court, and I quote:

"Given these findings, the District Court correctly concluded that the relevant activity was the round trip. The decedents did not make arrangements for legs of the trips separately. They made round-trip arrangements through the San Diego office at the outset, so we consider the arranged travel as a whole."

(7) At the beginning of the present trial, I addressed the findings of the District Court that had been reviewed by the Court of Appeals. Exportadora had at the outset of trial suggested those findings need not and should not be accepted as the law of the case. In my ruling, which I placed of record on January 13, 1993, I noted that, in order to determine the underlying jurisdictional issues, it had been necessary for the Court of Appeals to review the findings; that is, unless those findings were to be accepted, the jurisdictional issues could not be resolved by the Court of Appeals.

The transcript of my ruling contains an error and should be corrected to state that the decisions of the Court of Appeals on Exportadora's immunity claim are not subject to review in this court. I ruled that the factual findings accepted by the Court of Appeals must be followed in this court. I then went on to decide to what extent the findings upon which the Court of Appeals had relied were binding on trial in this court.

I held that it was clear that the Court of Appeals had accepted the earlier findings in the District Court but expressed no opinion as to the tort consequences of those findings. While the legal consequences of findings had been resolved by the Court of Appeals on the jurisdictional issue, the extent to which those findings have tort consequences remain an issue to be resolved at the trial. Nevertheless, as it developed, a great deal of evidence has been presented relating to the earlier findings of the District Court.

(8) Tottori University in Hamasaka, Japan had for some years prior to September 30, 1987 been involved in an agricultural project located at Guerrero Negro, Baja California,

Mexico. Exportadora's production facilities and plant are located in Guerrero Negro. The company maintained an office in Mexico City and, from 1974 to 1991, had an office in San Diego. On September 30, 1987, the manager of Exportadora's San Diego office was Manuel Guzman.

(9) In 1987, no regularly scheduled commercial airline operated between San Diego and Guerrero Negro, Baja California. The direct distance between the two cities is approximately 312 nautical miles. Transportation between San Diego and Guerrero Negro was by motor vehicle or by aircraft. Travel by motor vehicle from Tijuana to Guerrero Negro required nine hours. Exportadora operated a corporate jet aircraft which often undertook round trips from Guerrero Negro, where Exportadora maintained an aircraft hangar, to Tijuana on Mondays, Wednesdays and Fridays. Exportadora employed a pilot and copilot to fly its corporate aircraft, the Westwind.

(10) Transportation aboard the Westwind had to be approved by management or the directors of Exportadora. The Westwind was not offered for public use. Travel aboard the aircraft was limited to company directors, officers or employees and their dependents or other passengers for whom permission had been granted by Exportadora. Included among these passengers were business visitors, vendors and other invitees.

When the Westwind was not available for a scheduled flight, Exportadora entered into charter agreements with one of several licensed air taxi operators who provided an airplane and pilots for the charter.

(11) During the relevant time period in 1987, Mr. Matsushita of Mitsubishi's Tokyo office submitted requests or offers on behalf of Japanese visitors who desired to visit Guerrero Negro. In making arrangements for Japanese visitors to Guerrero Negro, Matsushita often communicated with Juan Luna who served in the administrative department of Exportadora in Mexico City.

On other occasions, Matsushita went directly to the top management of Exportadora to arrange a visit for the

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representative of a company whose business might be important to Exportadora.

(12) An exchange of telex communications between Luna and Matsushita in June of 1987 defined the program for the Tottori agricultural project in the latter part of 1987. On June 23rd, Luna sent a telex to Matsushita confirming travel on the company aircraft and reservations at San Diego and Guerrero Negro for Doctor Takeuchi and Doctor Toyama.

Luna requested more information on the agenda and work program involving the agricultural project and any documents that would support the visit of the two professors.

The following day, June 24, Matsushita responded to Luna's request for additional information. At the time Matsushita notified Doctor Takeuchi that travel and reservations had been arranged, Matsushita obtained from Doctor Takeuchi a brief outline of the planned program for the agricultural project. According to Matsushita, Dr. Takeuchi planned to remain at Guerrero Negro from the end of August until early December 1987.

Two other professors planned to stay at Guerrero Negro about three months, and several other professors would visit from time to time for about a week. The theme of the experiment planned for August to December 1987 included:

(1) Vegetable cultivation using water-holding substances.
(2) Study about salt accumulations on the surface of the ground.

In addition, Doctor Takeuchi planned to discuss with Exportadora the future of the agricultural field at Guerrero Negro including the possibility of another project.

(13) Matsushita continued to inform Exportadora of the names and travel itineraries of professors who were to visit the agricultural project at Guerrero Negro. He sent a telex to Luna on September 18 indicating that two professors of Tottori University, Doctor Katsuo Sugimoto and Doctor Yoshihito

Kodani, were expected to visit the project.

Matsushita requested that Luna arrange transportation between San Diego and Guerrero Negro for the two professors by pickup truck or company plane leaving on Wednesday, September 23rd and returning on Thursday, October 1st, with hotel reservations in San Diego and accommodations at Guerrero Negro. Matsushita also informed Luna of the scheduled arrival time of Doctor Sugimoto and Doctor Kodani at San Diego.

(14) The two professors, Doctor Sugimoto and Doctor Kodani, were met at Lindbergh Field in San Diego on September 22nd by Mikiko Izumi. She had previously met Doctor Sugimoto in 1986 when he visited the agricultural project at Guerrero Negro. On that occasion, she took Doctor Sugimoto to a bus terminal in Tijuana to catch a bus traveling overnight to Guerrero Negro.

When she met Doctor Sugimoto and Doctor Kodani on September 22, she arranged to put them up at the Executive Hotel and that evening had dinner with them. The expenses were borne by Exportadora.

On the following morning, Wednesday, September 23rd, they were taken to Tijuana airport by the company van and boarded the Westwind for the flight to Guerrero Negro.

(15) Matsushita sent a telex on September 4, 1987 to the attention of the manager of Exportadora, Manuel Millan, concerning a request by Omachi to visit Exportadora's salt field at Guerrero Negro. Matsushita informed Millan that Omachi was the new manager of the raw material section of Asahi Chemical and that one of Omachi's areas of responsibility was the purchase of raw salt. He went on to say that Asahi Chemical is one of the most important customers for Mitsubishi's Mexican salt business.

Matsushita provided Omachi's proposed itinerary which provided that Omachi depart San Diego from Guerrero Negro on September 28, return from Guerrero Negro to San Diego on September 30 and on to Los Angeles with departure from Los Angeles en route to Japan at 12:50 p.m. on September 30th.

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Matsushita sent a second telex to Millan on September 7 stating that Asahi Chemical and Omachi were awaiting Millan's confirmation for the visit to Guerrero Negro. Matsushita also noted that Omachi was very anxious because he was being pushed by his boss to finalize his business trip as soon as possible.

The next day, September 8th, Matsushita sent a telex to Millan thanking him for confirming Omachi's visit to Exportadora's plant. Once again, Matsushita stressed that Omachi had authority over salt purchases and that Asahi Chemical was a major customer.

Matsushita requested that Millan instruct his staff to make certain Omachi was given a good impression of Exportadora's salt. Finally, Matsushita sent yet another telex concerning Omachi's visit to Juan Bremer, Exportadora's subdirector of production at Guerrero Negro, Mr. Shinohara, a Mitsubishi representative and assistant to Exportadora's co-manager, and Isamu Hina at Guerrero Negro. Matsushita summed up his telex by saying, "We hope that your beautiful explanation and arrangements will charm him very much."

(16) Mr. Omachi was met at Lindbergh Field in San Diego on September 27, 1987 by an employee of Baja Bulk Carrier, S.A., a company associated with Exportadora. Arrangements had been made to put Omachi up for the night at the Westgate Hotel in San Diego. On the morning of September 28, Mr. Omachi was taken in Exportadora's van from San Diego to Tijuana airport where he boarded the Westwind for the flight to Guerrero Negro.

(17) Matsushita was employed by Mitsubishi in its Tokyo office at all times relevant to this litigation. Documentary evidence, including telex communications as well as the testimony of witnesses, establish that Matsushita was authorized on behalf of Exportadora at all times between June and September 1986 to conduct negotiations with Japanese representatives such as Mr. Omachi of Asahi Chemical and Doctor Sugimoto and Doctor Kodani of Tottori University for visits to the Exportadora facilities at Guerrero Negro.

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(18) Matsushita received offers or requests by business representatives such as Omachi or the Tottori University professor to travel from Japan by way of San Diego to Guerrero Negro, Baja California to visit Exportadora's facilities. He was authorized by Exportadora to offer accommodations to approved visitors at San Diego and Guerrero Negro as well as transportation, all at Exportadora's expense, from San Diego to Guerrero Negro and return.

(19) On the record there is little evidence of the actual communications between Matsushita acting for Exportadora or on Exportadora's behalf and Mr. Omachi or the Tottori professors, Doctor Sugimoto and Doctor Kodani.

The three visitors were killed in the aircraft accident of September 30, 1987. Matsushita's testimony, either by way of deposition or otherwise, was not offered at trial. In addition, the records are not complete. It cannot now be determined whether the Japanese visitors submitted requests or made definite offers including all of the terms and conditions of the visits to Guerrero Negro. There is, however, ample evidence provided by the documents and in the testimony of witnesses to establish the basic terms and conditions of the agreement arrived at between Exportadora and Mr. Omachi and between Exportadora and Professors Sugimoto and Kodani.

(20) Mr. Omachi was to arrive at San Diego on September 27th. He was met by a representative of Baja Bulk, S.A. and put up overnight at the Westgate Hotel in San Diego. Exportadora arranged transportation for him by company van and airplane from San Diego to Guerrero Negro on September 28th and for his return from Guerrero Negro to San Diego on September 30th.

(21) Professors Sugimoto and Kodani were met on September 22nd at Lindbergh Field by Exportadora's representative, Mikiko Izumi. She arranged their accommodations at the Executive Hotel, San Diego and on the following day, September 23rd, transportation was provided by Exportadora's van to Tijuana airport where the two professors boarded the Westwind for Guerrero Negro. They were

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scheduled to return to Tijuana by air on September 30th.

(22) All accommodations at San Diego and at Guerrero Negro for the three Japanese visitors were arranged by Exportadora. The transportation from San Diego to Guerrero Negro and the return to San Diego was entirely arranged by Exportadora. The three Japanese visitors took no part in making arrangements for accommodations in San Diego or Guerrero Negro, nor did they take any part in making the arrangements for travel between San Diego to Guerrero Negro and return to San Diego.

(23) In making the arrangements, Exportadora undertook to accommodate the travel arrangements of the three Japanese visitors, from the time of their arrival in San Diego until the return of the visitors to San Diego. The early-morning departure of the charter aircraft from Guerrero Negro to Tijuana on September 30 was arranged by Exportadora to meet the travel requirements of Mr. Omachi in order to return him to San Diego in time for him to proceed on to Los Angeles to make his scheduled departure from Los Angeles at 12:50 p.m.

(24) As the Ninth Circuit held in Schoenberg vs. Exportadora, the transportation of Mr. Omachi and Professors Sugimoto and Kodani from San Diego to Guerrero Negro and return was in the nature of commercial transactions. In exchange for its agreement to provide Omachi's accommodations and transportation, Exportadora received consideration in the form of potential commercial dealings.

In return for providing accommodations and transportation to Professors Sugimoto and Kodani, Exportadora received consideration by way of future commercial dealings in other contexts.

(25) In July of 1987, Carmen Chavez Frazier, at the direction of Manuel Guzman, manager of Exportadora's San Diego office, sent a telex to Juan Bremer, advising him that two technicians from Berkeley Pump Company desired to visit Guerrero Negro for the purpose of providing information to Exportadora employees on the use of Berkeley Pump products. Exportadora was at that time a major customer of Berkeley

Pump. On September 10th, Chavez sent another telex to Bremer's attention stating that two technicians from Berkeley Pump were interested in visiting Guerrero Negro to offer technical recommendations on use of Berkeley pumps at Exportadora's plant.

Finally, on September 18th, Bremer responded by telex granting permission for the two technicians to arrive on Monday, September 28 and to return to San Diego on Wednesday, September 30. Chavez sent a telex to Bremer on September 22nd confirming the arrangements. The two technicians, Schoenberg and Hernandez, left San Diego aboard the Westwind on September 28th.

(26) Ms. Peregrino, an attorney in the administrative office of Exportadora, was authorized to schedule the company aircraft, Westwind, and to obtain charters of air taxi companies if the Westwind should not be available because of maintenance or for other reasons.

Peregrino caused schedules to be prepared including lists of passengers to be carried on the Westwind or on chartered flights by air taxi companies. The passenger schedules were published each week for the upcoming two-week period.

(27) Enrique Achoy was in charge of the guest house and dining facilities of Exportadora and, when authorized or instructed by Peregrino, arranged with air taxi companies to obtain an aircraft of sufficient size to carry scheduled passengers.

(28) The names of Doctor Sugimoto and Doctor Kodani appear on the schedule published for the weeks of September 20th and September 27th. They were scheduled to arrive at Guerrero Negro from Tijuana on Wednesday, September 23rd. On the same schedule, arriving on Monday, September 28th from Tijuana to Guerrero Negro, were the two Berkeley Pump technicians, Mr. Schoenberg and Mr. Hernandez.

(29) Mr. Omachi's name did not appear on the schedules for September 20th but did appear on the schedules published for the weeks of September 27th and October 4th. According to those schedules, he was to arrive from Tijuana on September

28th.

(30) The five passengers listed for departure from Guerrero Negro on September 30th were Doctor Sugimoto, Doctor Kodani, Mr. Omachi, Mr. Hernandez and Mr. Schoenberg.

(31) The Westwind was not available for the flight scheduled from Guerrero Negro to Tijuana and return on September 30th. A directors' meeting had been arranged in Mexico City, and the Westwind was committed to provide air transportation for Exportadora's executives.

Peregrino authorized Achoy to obtain a charter of an air taxi company to carry the scheduled passengers from Guerrero Negro to Tijuana airport.

(32) For several years prior to September 30, 1987, Exportadora arranged charters with several air taxi companies on those occasions when the Westwind was not available. One of the air taxi companies frequently chartered by Exportadora was Aviones de Sonora. The records of Exportadora disclose that Aviones charters often carried corporate directors and officers and their wives and children.

Exportadora assumed the expenses for the charter and made no charge to the passengers. In short, the transportation of Exportadora's personnel and their dependents or of business visitors on charter flights was on the same basis as flights made aboard the corporate aircraft, Westwind.

Until the accident of September 30, 1987, Aviones had provided Exportadora with safe and reliable air service on charter flights between Guerrero Negro and Tijuana and return.

(33) Achoy, upon being notified by Peregrino that the Westwind would not be available to carry the scheduled passengers from Guerrero Negro to Tijuana and return to Guerrero Negro on September 30th, undertook to charter an aircraft capable of carrying the number of passengers listed on the schedule. Five passengers had been scheduled to depart Guerrero Negro for Tijuana on that date and, on the return flight to Guerrero Negro, two passengers had been scheduled.

(34) Achoy made his selection of an air taxi company

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on the number of passengers to be carried and upon the availability of the company to furnish an aircraft capable of carrying the number of scheduled passengers.

Early in the afternoon of September 29th, Achoy obtained a charter from Aviones. Exportadora, by selecting Aviones, provided a licensed, qualified and fully competent air taxi operator. Exportadora was entirely responsible for the selection of Aviones, the passengers including the Japanese visitors and had nothing to do with arranging the charter. Achoy was aware that Mr. Omachi needed an early departure from Guerrero Negro in order to make his scheduled flight out of San Diego for Japan.

Achoy requested that the Aviones aircraft be flown from Hermosillo to Guerrero Negro on September 29 to be available for early-morning departure on September 30th.

(35) Pilot Raul Gutierrez Tellez was selected by Aviones to undertake the flight. Neither Achoy nor anyone else from Exportadora participated in selection of the pilot. Rather, the selection of the aircraft and the pilot rested in the hands of Aviones, a licensed and certified air taxi company.

(36) There is sharp conflict among the experts who were qualified at trial concerning Pilot Gutierrez' qualifications to undertake the flight of XAKOA on the morning of September 30, 1987. Jack Jaax, a very experienced and expert pilot, testified for the Plaintiffs. In Jaax' opinion, Pilot Gutierrez lacked sufficient instrument or simulator time during the six-month period immediately prior to the accident to remain current for an instrument rating or to fly an ILS approach. Jaax rested his opinion on an examination of the pilot's log book, the performance of the pilot in making the flight and the actual approach of flight XAKOA to runway 09 at Tijuana as well as the circumstances of the accident.

(37) Experts offered by the Plaintiffs and the Defendants have relied in part on the pilot's log book in reaching their opinions. At trial, Plaintiffs sought to undermine the validity of the log book by offering evidence that a page in the log book containing the validation of the pilot's license and

instrument rating dated June 29, 1987 and several of the following pages were not in the handwriting of the pilot.

Plaintiffs suggest by inference that falsification took place in order to establish the qualifications of the pilot to fly XAKOA from Guerrero Negro to Tijuana and return on the morning of September 30, 1987.

The Defendant, Exportadora concedes that the handwriting may not be in the writing of the pilot and indeed Defendant's expert, Robert Griscom in his testimony observed that the handwriting in the pilot's log book may be that of different persons. He suggested, however, that this fact would make little difference for, based upon his own experience as a pilot and as a Federal Aviation Administrator, where he examined hundreds of pilot logs, he found that entries in pilot logs were often made by airline companies, secretaries, spouses and others as well as by the pilot.

(38) At the close of the evidence, Plaintiffs sought to offer a questioned-document examiner to testify that the questioned handwriting in Gutierrez' log book was not the pilot's handwriting. I did not accept the evidence offered by the expert and have placed my reasons on the record.

Although I find that the questioned entries in Gutierrez' log book were probably not in his handwriting, this in itself does not prove the entries false, and other evidence supports my finding that Gutierrez was qualified.

(39) Plaintiffs also offered Richard Taylor who qualified as an expert pilot to testify to the competency of Gutierrez as well as to other matters. While Taylor was unable to say, based upon the regulations for air traffic (Mexico), whether the pilot qualified for instrument flight, he did concede that the pilot might have been qualified under the appropriate regulations.

However, based upon his examination of pilot's log book and the performance of the pilot, Taylor expressed his opinion that the pilot was neither competent nor qualified to undertake an instrument flight at the time he made the flight

from Guerrero Negro to Tijuana.

(40) Robert Griscom who qualified as an expert pilot and as an expert accident investigator expressed a contrary view. In his opinion, Gutierrez was in fact well qualified to operate as pilot in command of a Cessna 340A. Griscom based his opinion on a thorough investigation of the pilot's qualifications.

In the course of his investigation, Griscom learned that Gutierrez had graduated from the Flying School of Mexico and had met all requirements for qualifying as a commercial pilot.

In order to qualify for an instrument rating, a pilot is required to have 40 hours of instrument time. Gutierrez had accumulated more than 123 hours of instrument time up to the date of the accident, September 30th.

In order to maintain a current instrument rating, a pilot must either fly two hours under the hood with a qualified instructor or have six hours of simulator time within the past six months.

Although records of pilot revalidation for Aviones were kept in the office of the Commandante at Hermosillo airport, the records are maintained for only one year and are then destroyed. However, Griscom in the course of his investigation found that the records of revalidation of the pilot's commercial licenses and instrument ratings are also maintained by air taxi companies and that Gutierrez had obtained a revalidation of his commercial license and instrument rating on June 29, 1987 validating his license and ratings until January 31, 1988.

Griscom further determined that Gutierrez did not log simulator time in his log book and that the handwriting in the log book may be of more than one person.

Finally, Griscom interviewed Commandante Juarez at Hermosillo airfield concerning Gutierrez' qualifications as a pilot.

(41) Griscom's investigation into pilot Raul Gutierrez Tellez' qualifications to operate as pilot in command of a Cessna 340A at the time of flight XAKOA from Guerrero Negro to Tijuana, September 30th, were detailed, thorough and provided reliable information upon which to rest his opinions.

(42) German Gaytan was qualified as an expert in the examination and qualification requirements of pilots, air controllers and aviation technical personnel in Mexico. He has served as chief examiner of the licensing department in the General Office of Civil Aviation and in the office of the Attorney General of Mexico.

To qualify as an air taxi pilot in Mexico, the pilot must have a commercial pilot license. In order to obtain a commercial pilot license in Mexico, the pilot must have attended a flight training school and accumulate 180 hours of flight time. The pilot of XAKOA on September 30, 1987, Raul Gutierrez Tellez, had flown 2,623 hours.

A pilot seeking an instrument rating must fly 40 hours instrument time, and Pilot Gutierrez had flown 123.5 hours of instrument time.

To be qualified for a multi-engine rating, the pilot must fly 10 hours and Pilot Gutierrez had flown 2,079 hours. Gaytan, who as chief examiner first issued a pilot's license to Gutierrez, reviewed the records maintained by the General Office of Civil Aviation and Gutierrez' log book.

On the basis of his investigation, Gaytan found that Gutierrez' commercial pilot license and instrument rating had been revalidated on June 29, 1987 and were valid until January 31, 1988. Review by Gaytan of the General Office records revealed that Pilot Gutierrez had no accidents and no recorded reprimands or other disciplinary action taken against him prior to the fatal accident on September 30, 1987.

(43) Gaytan made a careful and thorough inquiry into the records available to him at the Department of Civil Aeronautics and his testimony was credible and reliable. Pilot Gutierrez at the time of the flight of XAKOA from Guerrero Negro to Tijuana on September 30, 1987 was a qualified pilot for the flight, and his commercial pilot license had been revalidated June 29, 1987 and was current. His instrument rating had been revalidated prior to the flight and would have been valid until January 31, 1988.

(44) Richard Taylor examined the appropriate

regulations for air traffic (Mexico) to determine the requirements for a copilot on charter flights by an air taxi company. The regulations do not require copilots on aircraft of less than 12,500 pounds if the aircraft carries certain instruments or equipment including an autopilot. He was aware that XAKOA was equipped with an autopilot. However, without additional information, he could not say if the flight of XAKOA on September 30th was in violation of the regulations requiring a copilot.

(45) In Robert Griscom's opinion, no copilot was required for the flight of XAKOA from Guerrero Negro to Tijuana on September 30th. Based on his examination of Article 132(b) of the regulations for air traffic (Mexico), he expressed his opinion that XAKOA carried the necessary navigational equipment including an autopilot.

He also stated it was the practice or custom to qualify pilots for operation of the autopilot at the time a pilot prepared for revalidation of their licenses and instrument ratings. German Gaytan who had reviewed the official records and pilot log of Raul Gutierrez Tellez found that, at the time of departure of XAKOA from Guerrero Negro on the morning of September 30th, the instruments and other navigational equipment installed in the aircraft and the qualifications of Pilot Raul Gutierrez Tellez allowed the flight from Guerrero Negro to Tijuana to be conducted under the controlling regulations, Article 134(b)(II), Mexican Air Regulations, without a copilot.

(46) I find that the instruments and other navigational equipment installed on the aircraft and the qualifications of the pilot, Raul Gutierrez Tellez permitted the flight of XAKOA to be conducted without a copilot in full compliance with the controlling Mexican air traffic regulations.

Immediately prior to the time of departure, XAKOA shortly after 6:00 a.m. on the morning of September 30, 1987, Pilot Gutierrez would have had available to him terminal weather and airway reports for a flight to Tijuana. Access to Tijuana airport weather could be obtained at that time by pilots 24 hours a day by telephone call to government-maintained

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facilities at Mazatlan.

(47) Following Gutierrez' arrival at Guerrero Negro, Enrique Achoy took the pilot to Exportadora's guest quarters to provide overnight accommodations for him. As they entered the dining room, Achoy observed a group of Japanese at dinner. The group included Doctor Sugimoto, Doctor Kodani, Mr. Omachi, Mr. Hina and probably Doctor Takeuchi.

Achoy did not speak Japanese but spoke in either Spanish or English to Mr. Hina or Doctor Takeuchi. Achoy introduced Gutierrez saying that he would be their pilot for the flight on the next day.

The departure of the flight from Guerrero Negro to Tijuana had been originally scheduled at 7:00 a.m. The Westwind would have been able to make the flight in approximately one hour and, upon departure at 7:00 a.m., would arrive at Tijuana by 8:00 a.m., but the Cessna 340A furnished by Aviones was a turbo-driven propeller aircraft and required two hours to make the flight.

Gutierrez, when he learned that Omachi needed to arrive at Tijuana at 8:00 a.m., informed Achoy that the departure of XAKOA should be at 6:00 a.m.

Hina then informed Mr. Omachi, Doctor Sugimoto and Doctor Kodani that departure of the flight was scheduled for 6:00 a.m.

Achoy also told Gutierrez that, if conditions were not right in Tijuana airport, the pilot could proceed to Mexicali.

(48) Jose Blanco, the supervisor of salt production for Exportadora at Guerrero Negro, informed Schoenberg and Hernandez on the evening of September 29 that the aircraft was leaving very early the next morning because a Japanese passenger had to arrive at Tijuana in order to make a flight connection.

(49) Exportadora scheduled the flight to depart so that Omachi could meet his travel arrangements beyond San Diego. But the decision to make the flight and full control of the aircraft during the flight rested with Pilot Raul Gutierrez Tellez.

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Insofar as Exportadora was concerned, Aviones was an independent contractor responsible for the selection of a competent, qualified pilot and a suitably, properly maintained aircraft. But the transportation of the passengers by Aviones from Guerrero Negro to Tijuana was on behalf of Exportadora in discharge of Exportadora's obligation to the scheduled passengers. The Aviones pilot and aircraft was nothing more than a substitution for Exportadora's pilot and the Westwind, and the obligation to return the passengers from Guerrero Negro to San Diego remained with Exportadora.

(50) Shortly after 6:00 a.m. on September 30, 1987, the five passengers boarded XAKOA for the flight to Tijuana. Prior to boarding, the pilot weighed the baggage of each passenger. Victor Garcia, employed in the San Diego office of Exportadora, estimated mail bags from Guerrero Negro weighed five to seven pounds, although heavier loads might be taken in mail bags from Tijuana to Guerrero Negro.

It has been suggested by Plaintiffs that XAKOA may have been overloaded at the time of departure. Evidence related to the takeoff weight of the aircraft fails to prove that XAKOA was overloaded. No expert who testified as to the cause of the accident has formed an opinion that improper overloading of XAKOA was the cause of the accident.

I find that the Plaintiffs have failed to prove that XAKOA was either improperly loaded or overloaded for the flight from Guerrero Negro to Tijuana airport on September 30, 1987.

(51) Plaintiffs offered evidence suggesting that Exportadora caused the departure of XAKOA from Guerrero Negro to Tijuana when Tijuana airfield was below IFR conditions thereby causing the aircraft to make an approach to Tijuana airport when the airfield was below IFR minimums or had zero visibility.

Exportadora scheduled the flight of XAKOA to accommodate Omachi's travel schedule. The evidence is conflicting on whether Gutierrez filed an IFR flight plan.

(52) Robert Griscom, the expert pilot and accident

investigator, expressed an opinion that Gutierrez filed an IFR flight plan designating Mexicali as an alternate airport. He rested this opinion upon his investigation in which he learned of the altitude flown by the pilot en route to Tijuana. The altitude flown by the pilot, Gutierrez from Guerrero Negro to Tijuana would have been inappropriate for VFR flight.

(53) Richard Taylor, a pilot expert for Plaintiffs, noted that the preliminary report of the NTSB reported that an IFR flight plan had been filed for the flight of XAKOA to Tijuana the morning of September 30th. However, in the final NTSB report, Taylor noted that the appropriate entry for an IFR flight had not been entered in the report and believed that the NTSB investigator, Wahl, found a lack of sufficient information.

I find the evidence given by Robert Griscom to be credible and reliable on this point. It is more probable than not that Pilot Gutierrez filed an IFR flight plan prior to departing Guerrero Negro for Tijuana and that Gutierrez did so based on whatever information may have been available to him prior to departure of XAKOA from Guerrero Negro.

(54) After XAKOA departed for Tijuana airport, Achoy sent a telex advising Guzman at San Diego of the departure time. He backdated the telex to September 29.

(55) The two expert pilots who testified on behalf of the Plaintiffs as to the cause of the accident on September 30, 1987, Jaax and Taylor, were of the opinion that adequate fuel was on board XAKOA at the time Pilot Gutierrez made the approach to runway 09 at Tijuana.

(56) William Ross, who was qualified by the Plaintiffs as an expert aircraft accident investigator, expressed his opinion that at the time of impact the aircraft was neither at stall speed nor low power setting.

(57) But Plaintiffs also called a number of witnesses who testified they were unable to detect the odor of fuel at the time those witnesses were at the site of the wreckage September 30, 1987.

Among the witnesses who did not detect the odor of fuel or any signs of fuel spillage were James Evans, Jesus Cesena,

Terrance Baird, William Johnson and Carl Eklund.

(58) Several witnesses testified that shortly before the accident they heard an aircraft which they believed to have been the aircraft that was involved in the accident and that the engines of the aircraft sounded similar to engines running out of fuel or not normally operating.

These witnesses also presented by Plaintiffs included Juanita Reyes, Francisco Figueroa and Salvador Cervantes.

Finally, in an affidavit filed by Plaintiffs' attorney, Robin Foor, May 1, 1989, he stated, based on his personal knowledge, that a defective condition in the Cessna 340A caused a fuel leak which may have caused or contributed to the crash.

(59) Enrique Achoy, after the arrival of XAKOA on September 29, 1987 at Guerrero Negro from Hermosillo, asked Gutierrez whether the pilot had fuel for the flight. Gutierrez responded that he had.

William Ross, who arrived at the site of the wreckage on October 1st, examined the remaining wreckage of XAKOA. Much of the wreckage of the aircraft had by then been carried away since the NTSB investigator had failed to arrange for guards or other law enforcement protection overnight at the site of the crash.

Ross, however, was able to examine the remains of the fuselage of XAKOA and detected the odor of fuel in the upholstery. Ross was also able to examine photographs of the wreckage taken on September 30th including a wing-tip fuel tank. He found that a wing-tip tank had bulged forward from fuel pressure at the time of impact. In his opinion, the fuel then vaporized into the atmosphere. The fuel lines were torn and retained no fuel.

(60) The witnesses who believed that they heard the engines of the aircraft running out of fuel were not operating normally were, I find, not reliable witnesses concerning the condition of the engines or the fuel state of XAKOA shortly before impact.

(61) Neither the tape, Exhibit YYY, or transcript, Exhibit WW, indicate any communication between the pilot and

the air controller having to do with low fuel state or engine malfunction. The pilot on several occasions in his communications with the air controller indicated that he was considering an alternate field. It is highly improbable that the pilot would consider an alternate field in the event of engine malfunction or exhausted or low fuel state.

(62) The testimony of the pilot experts called by the Plaintiffs and of the expert aircraft accident investigator, Ross are credible, and their opinions having to do with fuel exhaustion and power settings at the time of impact are reliable.

The impact of XAKOA on the hillside on the approach of the aircraft to runway 09, Tijuana airport, was not caused by fuel exhaustion or from lack of fuel aboard the aircraft on the morning of September 30, 1987.

(63) The opinions offered by the experts are in sharp conflict on the cause of the accident. Plaintiffs' pilot experts are of the opinion that Raul Gutierrez Tellez was neither competent nor qualified to make the flight from Guerrero Negro to Tijuana on the morning of September 30, 1987 and in their opinion the cause of the accident was due to errors on the part of the pilot.

On the other hand, Defense expert Griscom is of the opinion that the cause of the accident can never be known because of the removal of the wreckage of the aircraft from the site of the accident during the evening of September 30th and the morning of October 1st.

Defendants' expert is also of the opinion that the air controller at Tijuana airport had taken full control of the approach made by the pilot to runway 09 and, under the circumstances then existing, contributed to cause the accident.

(64) Richard Taylor, a pilot expert qualified by the Plaintiffs, was of the opinion that Pilot Raul Gutierrez Tellez was neither qualified nor competent to make the flight from Guerrero Negro to Tijuana on September 30th. He based his opinion regarding the pilot's qualification on the pilot's log book. I have earlier made findings that the pilot was fully qualified to fly an IFR approach to runway 09 on September

30th.

(65) In Taylor's opinion, Pilot Raul Gutierrez Tellez demonstrated his lack of competence by not ascertaining the weather for the flight he was about to undertake, by attempting an approach under conditions of zero visibility and by failing to follow the proper glide slope to the runway.

In earlier findings, I found that Pilot Gutierrez probably filed an IFR flight plan based on information available to him at Guerrero Negro.

Taylor's opinion that the pilot attempted an approach to runway 09 under zero visibility rested upon his belief that the pilot received information that zero visibility existed at Tijuana airport at the time the pilot made his first contact with the Tijuana air controller, some 50 miles away from the airport.

According to Taylor, he was able to make out on the tape, YYY, the Spanish words for zero visibility. The tape itself was obtained from Plaintiffs' attorney, Robin Foor after Robert Griscom requested a copy.

According to Griscom, he was told by Foor, and I quote, "It's the best we have."

Tape, Exhibit YYY, was transcribed and, upon examination of the transcript, Exhibit WW by qualified interpreters and following an evidentiary hearing was received into evidence as having been sufficiently authenticated and reliable.

(66) Taylor statement that the words "zero visibility" appear on the tape is not supported by the evidence. I find that the section of the tape where Taylor is said to have the words "zero visibility" is too garbled to understand on both the enhanced and unenhanced versions.

Several expert translators retained by the parties have been unable to discern the Spanish phrase for "zero visibility" on either tape. Those words are not on the tapes.

(67) At trial, Plaintiffs offered another version of a transcript, sometimes referred to as the "SENEAM" transcript. That transcript does contain a communication from the air controller to the pilot of XAKOA that Tijuana has zero

visibility. Gaytan was able to examine some of the records during his investigation into the pilot's qualifications and the maintenance and inspection of Aviones air taxi operations. But when Gaytan requested the file relating to the official investigation of the crash of XAKOA by the Mexican government, the records were withheld from him by the agency having custody of the documents.

But Gaytan had reviewed the transcript designated as identification 13, referred to as the "SENEAM" transcript after it had been provided to Defense Counsel by Plaintiffs several days before Gaytan's deposition of January 31, 1992.

Gaytan was unable to authenticate the transcript as a part of the official record of the investigation by Mexican authorities into the accident, nor was he able to obtain access to the original tape of the communications between the air controller at Tijuana airport and the pilot of XAKOA shortly before the accident.

While he said at his deposition that the air controller at Tijuana airport had provided the pilot with weather information and received information that the field was closed, Gaytan explained at trial that those statements were entirely based upon his review of the "SENEAM" transcript.

(68) After Gaytan examined the transcript, Exhibit WW, prepared from the tape, Exhibit YYY, furnished by Plaintiffs' counsel, Gaytan changed the opinion expressed by him at the deposition and believed at the time he testified during the trial that the air controller did not inform Pilot Gutierrez of weather conditions at Tijuana or that the airport was closed.

Although Gaytan has attempted to obtain additional information relating to the recorded conversations from the government agencies in Mexico, he has been unable to do so.

Following an evidentiary hearing, I found that the "SENEAM" transcript had not been sufficiently authenticated to be received into evidence, and it has not been made an exhibit.

(69) There are other reasons which render it improbable that Pilot Gutierrez attempted an approach to runway 09 believing that visibility was zero. According to transcript WW, the controller mentions minimum conditions at the airport,

saying, quote:

> "Okay, then...uh...the attempt... uh...where it would adapt better to the minimums is to the ILS to the runway 09 with calm wind. Uh... considering this continue on radial 144 to execute the arrival codified as Avena two and the ILS to the runway zero nine."

(70) Earlier, after having been told by the controller that the airfield was restricted to all operations, Pilot Gutierrez inquired if the field is closed due to fog with winds. The controller responds, quote:

> "Uh...no, not closed, gentlemen. The airport is restricted to all type of operations because it's [garbled]."

(71) The pilot, Raul Gutierrez Tellez, then indicated his willingness to proceed to Tecate and at that point the controller offered Pilot Gutierrez the opportunity to make an attempt with the controller's assistance.

(72) At the time that Gutierrez in XAKOA began an approach to runway 09 at Tijuana airport, the pilot had not been informed that the visibility on the runways was zero nor that the field was closed to all operations, but rather the controller, based on existing weather conditions, informed the pilot that an ILS approach to runway 09 could be attempted.

(73) Upon reviewing transcript, Exhibit WW, Gaytan reached the opinion that the approach of XAKOA was a radar approach under regulations, Sections 3.1 through 3.1.6.1 of Part III of the regulations for air traffic (Mexico).

According to the regulations, a radar approach may be provided to any pilot who makes such a request regardless of weather conditions or to any aircraft in an emergency or in danger or to expedite traffic. Section 3.1.2.

However, a radar approach does not exempt the pilot

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from compliance with weather minimums prescribed for the airport. Section 3.1.2.1.

In the event of a radar approach, the controller is required to provide an altimeter check, ceiling and visibility information when the reported ceiling is under 1,500 feet and visibility is less than five miles.

Although Gaytan describes the approach of XAKOA as a radar approach to runway 09, when closely questioned, Gaytan explained that the pilot of XAKOA began on a radar approach to the localizer. But when the pilot captured the localizer, he then began an ILS approach to the runway.

According to Section 3.2.5, Part III of the regulations for air traffic (Mexico), during final descent to the airport under a radar approach, the pilot shall be informed of the distance of the aircraft from the head of the runway and the recommended altitude at each nautical mile of final approach. Section 3.2.5(b).

The pilot is required to notify the controller when he sees the runway or the approach lights. Section 3.2.5(c).

But if the approach is conducted under IFR conditions and the pilot has not given notice that he has the runway or lights in sight when he has reached one nautical mile from the head of the runway, the controller shall instruct the pilot implement a failed approach. Section 3.2.5(b).

(74) Under the regulations for air traffic (Mexico), if a pilot undertakes an approach, the controller may not prohibit the approach, but it always remains the pilot's duty to control the aircraft in a safe manner.

If the pilot undertakes an ILS approach to a runway, it is the pilot's responsibility to execute the approach in a safe manner and in full accordance with the regulations or to execute a failed approach.

(75) Griscom testified that he was unable to form an opinion on whether pilot negligence was a contributing cause of the accident. That is so, he stated, because the failure of the NTSB to document and secure the wreckage of the aircraft brought about the loss of critical information necessary to a

determination of whether the accident was caused by structural, mechanical or instrument failure of the aircraft.

According to Griscom, the best evidence would be the wreckage and, without that, there could be no actual determination what caused XAKOA to descend below the glide path and into contact with the terrain. Among the possibilities that might have been considered, according to Griscom's opinion, is induction system icing resulting in impaired engine performance while the pilot was making an attempt to execute a failed approach.

(76) Griscom also expressed an opinion that the actions and conduct of the air controller was a substantial factor in bringing about the accident. Griscom suggested that, had the air controller cleared Pilot Gutierrez to an alternate field at Mexicali, no accident would have happened. However, according to Griscom, not only did the air controller refuse to grant the pilot clearance to alternate airports when requested by the pilot, but the air controller failed to provide the required visibility or ceiling information, did not declare a failed approach when required to do so and actually took command of the approach and required the pilot to make the approach, misleading the pilot into believing that he was on a radar surveillance to runway 09.

I find Griscom's opinion concerning the pilot's approach to runway 09 and his evaluation of the air controller's actions to be contrary to the underlying evidence.

(77) Transcript, Exhibit WW, does include conversations between the pilot and the controller relating to alternate airports. After the controller informed Pilot Gutierrez that airport operations were restricted to all types of operation at Tijuana airport, the pilot suggested proceeding to Mexicali.

The controller then suggested Tecate, and at that point the pilot responded that he was going to see if he could make it to Tecate.

A moment later, the controller instructed the pilot to activate 1205 (a frequency) for identification on the radar.

After obtaining XAKOA on radar, the controller

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provided the pilot with a fix of XAKOA's position and offered to provide assistance if the pilot should desire to make an attempt to Tijuana airport.

Minimum visibility to runway 09 was three quarters of a mile. The pilot took a reading on the aircraft's DME and decided to attempt an approach, telling the controller, quote, "We'll see if we can make one attempt."

(78) I find that the controller in this instance did not refuse Pilot Gutierrez clearance to an alternate airport, but instead offered to assist the pilot in the event that the pilot wished to make an attempt at Tijuana airport. The pilot at that point decided to make an attempt.

The controller then provided information to the pilot with the best approach to the airport in view of the restricted condition. He advised the pilot under the conditions an ILS approach to runway 09 was best and provided the pilot with a designated approach or a pattern to bring the aircraft to point Alba at the proper altitude of 2,500 feet. See Exhibit XXX.

The pilot confirmed the indicated approach and, at the request of the controller, announced the aircraft's altitude at the time.

Shortly thereafter, the pilot reported a failure of the DME and requested clearance for Tecate. The controller responded, and I quote,

> "I have you now on radar contact. If you wish, I can give you vectors to the localizer so you can make the attempt."

The pilot then declared his intention that he would continue the approach informing the controller, quote, "Okay, if it's possible." I find that the pilot, having informed the controller of the failure of the DME, was then told by the controller that he would provide assistance to bring the aircraft to the localizer if the pilot wished.

The pilot chose this option and decided to proceed with the attempt. The air controller provided the pilot with a vector

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to the localizer and provided the pilot with information to the correct altitude. But the air controller also provided the pilot with instructions in the event of missed approach and in that event a clearance for Tecate.

(79) The evidence in transcript, Exhibit WW, indicates that the controller did not take command of the approach; rather, he provided assistance to the pilot and it was the pilot who made the decisions to undertake and to continue the approach. Moreover, the controller provided the pilot with instructions should the pilot decide to execute a failed approach and to continue on to Tecate.

(80) The controller continued to assist the pilot to point Alba and approve descent of XAKOA below 2,500 feet upon crossing Alba. The controller informed the pilot when the aircraft was three and a half miles from the head of the runway.

The pilot promptly responded indicating that the altitude of the aircraft was 1,200 feet.

At that point, the controller informed the pilot that the runway and approach lights were on. Finally, the controller informed the pilot that the aircraft was two miles out and the pilot promptly acknowledged receiving that information.

(81) At 7:56 a.m., XAKOA impacted on the hillside in line with the approach to runway 09 and all aboard the flight were instantly killed. Transcript, Exhibit WW, does not indicate a radar-controlled approach, but rather, because of the aircraft's DME failure, that the controller provided the pilot with information relating to distance from the runway not otherwise available to the pilot.

(82) Jack Jaax, pilot expert and air charter operator has experience in both the United States and in Mexico for over 25 years and has accumulated 25,000 hours of flight time. He is fluent in Spanish and has landed at Tijuana airport many times.

In his opinion, Pilot Gutierrez was making an ILS approach to runway 09 with surveillance radar assistance. The proper glide slope on an ILS approach enables a safe path to landing.

Upon intersecting the localizer, an ILS approach

provides the pilot with a radio signal as the aircraft follows the localizer along the flight path.

If the pilot deviates from the center line of the runway, the instrument indicates the deviation, permitting the pilot to correct his approach. If the pilot descends below the glide path, the deviation is indicated on the instrument so that the pilot may correct to a proper altitude.

A pilot executing an ILS approach must make a decision at the prescribed altitude for that airport either to continue the approach if the runway becomes visible or to execute a missed approach if the pilot at the prescribed altitude is unable to see the runway.

At Tijuana airport, the prescribed altitude to execute a missed approach is 786 feet above sea level which is 300 feet above runway 09.

(83) Although the air controller controls aircraft traffic within restricted zones and in the vicinity of airports, the pilot in command of an aircraft retains control over the aircraft in flight. If a pilot is given clearance to execute an approach to an airport, he is not required to make the approach.

I have earlier noted that the controller at Tijuana airport informed Pilot Gutierrez that in the case of a missed approach he was to ascend via radial two four zero, over the cap and continue on to Tecate.

(84) In Taylor's opinion, Pilot Gutierrez was not executing a radar surveillance approach to runway 09 because the controller did not provide the pilot with instructions to correct course or of altitude deviations as would necessarily be done on a radar surveillance approach.

Taylor expressed an opinion that, consistent with an ILS approach, the controller provided the pilot with vectors to intersect the localizer and inform the pilot of distances out from the runway because of the failure of the aircraft DME.

(85) Both Jack Jaax and Richard Taylor agreed in their opinions that Pilot Gutierrez descended below the proper glide path during their approach to runway 09 and failed to execute a missed approach when required to do so.

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Jaax and Taylor also agree in their opinions that Pilot Gutierrez' failure to properly follow the glide path and to execute a missed approach at the prescribed altitude contributed to cause the accident.

(86) I find that Pilot Gutierrez was making an ILS approach to runway 09 on the morning of September 30, 1987. He was not misled by the controller into believing that the approach was a radar surveillance approach.

During the approach, Pilot Gutierrez descended below the proper glide path and did not execute a missed approach when required to do so at the designated altitude of 786 feet above mean sea level at Tijuana airport.

(87) Robert Griscom has expressed an opinion that the failure of the NTSB to document and secure the wreckage of XAKOA precludes any determination of whether the cause of the accident was due to structural, mechanical or instrument failure.

(88) William Ross qualified as an expert aircraft accident investigator. He arrived at the site of the accident between 8:30 a.m. and 9:00 a.m. on October 1st.

After examining the scene, Ross determined that the aircraft impacted on a ridge running uphill. The left wing-tip tank impacted the terrain first. The aircraft continued for a short distance rotating toward the left. The propellers and engines impacted next leaving bits of wreckage strewn on the hillside.

The main part of the fuselage and wings impacted and then tumbled down the ridge and partially up a slope. The fuselage came to rest on the wings which had become detached following impact, but the right wing was to the left side of the fuselage and the left wing to the right side.

Ross expressed an opinion that, at the point of impact, the aircraft was traveling at a speed of 120 to 160 knots. Ross examined numerous photographs which had been taken on September 30th before removal of the wreckage from the site.

At the time of impact, landing gear on the aircraft was up.

Inspection of the photographs revealed that the exhausts were hot at time of impact; the impeller blades on the turbochargers indicated both engines were operating.

Propeller blades and propeller hubs shown in the photographs indicate that both engines were operating at power settings when impact occurred.

Ross found no evidence of engine failure or other defect in the aircraft.

(89) Michael Grimes, an accident reconstructionist employed by Teledyne, testified that his inability to examine the engines precluded him from determining whether the engines were operable at the time, and removal of the wreckage impeded his ability to determine the cause of the accident. I have considerable doubt whether he made an effort to determine the condition of the engines at the time of the accident or to undertake any investigation into its causes.

Ross readily conceded that the removal of wreckage during the night of September 30th and before 8:30 a.m. October 1st hampered his investigation and determination of the cause of the accident.

(90) However, Ross found enough evidence in his examination of the site that he was satisfied with his opinions, and most of the questions which he had entertained were resolved.

In his opinion, the engines revealed signs of power and high rotation. William Ross was a reliable and credible witness, and I find that the accident of September 30th was not caused by engine defect or failure.

(91) Nor do I find any probability of structural defect since winds were calm at Tijuana airport and the vicinity was shrouded with fog.

The pilot reported the aircraft DME not functioning, but there's nothing in the evidence otherwise indicating instrument malfunction.

(92) Nor is there anything in the pilot's communication with the air controller to indicate engine malfunction. To the contrary, the pilot indicated his readiness to proceed to an

alternate airport while he was well into the approach of runway 09 at Tijuana airport. The inference is that the aircraft was not malfunctioning or was operating on a low fuel state.

(93) I find, based upon all the evidence, the probable cause of the accident to be negligence on the part of Raul Gutierrez Tellez who, as pilot of XAKOA, descended below the proper glide path while making an ILS approach to runway 09, Tijuana airport, on the morning of September 30, 1987.

I find that the pilot failed to execute a missed approach as required when the aircraft reached the designated altitude of 786 feet above mean sea level at Tijuana airport.

Both of these errors on the part of the pilot amounted to negligence and both caused and together contributed to cause the accident and to the death of the passengers and the pilot on September 30th, 1987.

CONCLUSIONS OF LAW ON LIABILITY

(94) California tort and contract law determines Exportadora's liability in this case. Schoenberg vs. Exportadora, 930 F.2d 777, 783-84 (9th Cir. 1991).

Plaintiffs have made a claim that the agreement between Exportadora and the decedents involved an implied contract for non-negligent transportation. Defendants argue that this claim is not properly at issue in this case.

By order dated November 9th, 1992, United States District Judge John S. Rhoades ruled that Plaintiffs' motion to amend the complaint for the sixth time was unnecessary because the amendment did not state new causes of action but merely different theories under the same causes of actions. Judge Rhoades ruled, and I quote,

> "Of the theories listed in the proposed sixth amended complaint, the only ground that is arguably new is that of implied contract. This approach, however, is merely one more theory for holding Defendants directly liable.

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> Additional discovery and amendment of the complaint is thus unnecessary, and the implied contract theory of liability may be addressed at trial at the discretion of the trial judge."

(95) At trial, I have allowed evidence having to do with negotiations and conduct of the parties relating to Plaintiffs' contract claims. The parties have fully briefed legal issues of implied contract in pretrial and post-trial briefs.

I conclude that the contract claims have properly been brought before the Court in this case and, if necessary, I would allow a motion to amend the complaint to conform to the proof.

(96) Plaintiffs may have suggested at some earlier time that Exportadora operated as a common carrier in transporting the decedents. But I conclude that Exportadora acted as a contract or corporate carrier held to a standard of ordinary care.

A common carrier under California law is, quote,

> "...one who offers to the general public to carry goods or person and is bound to accept anyone who tenders the price of carriage." Webster vs. Ebright, 3 Cal.App.4th 784 (1992).

A common carrier must exercise the utmost care towards passengers while a private or corporate carrier is held to an ordinary standard of care, Webster at 788; Cal.Civ.Code § 2100.

The universal offer of carriage and the limited power to reject qualified passengers distinguishes a common carrier from a contract or corporate carrier. While commercial airlines are generally common carriers, a flight school, which was not shown to undertake to carry all student aviators indifferently, was held not to be a common carrier, Dziura vs. California Aviation Service, Inc., 4 Cal.App.3d 191 (1970).

(97) Exportadora did not undertake to carry all persons indifferently to Guerrero Negro and back. Travel aboard the

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company airplane, the Westwind, was limited to company directors, officers or employees and their dependents and other passengers for whom permission had been granted by Exportadora. Included among these passengers were business visitors, vendors and other invitees.

I conclude that Exportadora did not operate as a common carrier in transporting the decedents.

An entity that operates a transportation system to support its primary business purpose has been held to an ordinary standard of care in the operation of that system, Brown vs. Feather River Lumber Company, 203 Cal. 493 (1928).

In Brown, the defendant, quote,

> "...was not a common carrier of passengers but had built and was operating from its logging camp to the main line a short railroad designed for use in its logging and lumber business." Brown at 497.

For clarity, I will refer to this type of carrier as a contract or corporate carrier. I conclude that Exportadora transported Doctor Sugimoto, Doctor Kodani and Mr. Omachi as a corporate carrier.

As the Ninth Circuit held in Schoenberg, quote:

> "Exportadora maintained a regular air-and-auto link between its San Diego and Guerrero Negro offices as part of its commercial operations." Schoenberg vs. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991).

(98) Normally, the air portion of the transportation link between Tijuana and Guerrero Negro utilized the Westwind. When the Westwind was not available for a scheduled flight, Exportadora entered into charter agreements with one of several licensed air taxi operators who provided an airplane and pilots for the charter.

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Exportadora employed Aviones de Sonora as an independent contractor to assist Exportadora in performing its duties as a corporate carrier in the present case. As corporate carrier, Exportadora had a duty to transport the passengers using ordinary care.

The admitted fact that Aviones normally operated as a Mexican common carrier is irrelevant to the determination of Exportadora's liability on its agreement with the Japanese decedents.

(99) Plaintiffs contend that California Civil Code § 2090 imposes a common carrier level of care on all categories of carriers until, quote,

> "...the passenger is restored to as favorable a position as before he commenced the carriage."

This interpretation of the statute would seem to suggest that the distinction between common and other carriers has no legal significance.

In any event, Webster vs. Ebright, 3 Cal.App.4th 784, 787 n.2 (1992) makes clear that § 2090 deals with the distinction between common carriers with reward and common carriers without reward. Section 2090 does not impose the standard of care required of common carriers upon Exportadora in the present case.

(100) Plaintiffs contend that Exportadora should be liable for the breach of an agreement for the non-negligent transportation of the decedents. I have made findings that an agreement exists between Exportadora and the decedents for round-trip transportation between San Diego and Guerrero Negro.

I now conclude a covenant of non-negligent transportation should be implied in the agreement, that this contractual agreement was non-delegable and that Exportadora has failed to properly discharge this obligation.

Under the majority rule, a passenger may sue a common carrier for injuries under the contractual theory for breach of an

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implied covenant of non-negligent transportation.

While I have found no California authorities directly on point, most jurisdictions do allow passengers to elect to sue a common carrier either for negligence in tort or for breach of a contractual obligation for non-negligent transportation, citing the Bracewell vs. Nicholson Air Services, Inc., 748 F.2d 1499 (11th Cir. 1984) (applying Georgia law); Calhoun vs. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972); St. Michelle vs. Catania, 250 A.2d 874 (Md. 1969); Griffith vs. United Airlines, Inc., 203 A.2d 796 (Pa. 1964); Williams vs. Illinois Central Railroad, 229 S.W.2d 1 (Mo. 1950); Doughty vs. Maine Central Transportation Company, 39 A.2d 758 (Me. 1944).

England seems to follow the same rule, Protheroe vs. The Railway Executive, 1 K.B. 376 (England 1951).

New York allows such an election in the case of personal injury but not wrongful death, Kilberg vs. Northeast Airlines, Inc., 211 N.Y.S.2d 133 (N.Y. 1961).

Puerto Rican law does not allow a cause of action for breach of contract for non-negligent transportation, Ocasio-Juarbe vs. Eastern Airlines, Inc., 902 F.2d 117 (1st Cir. 1990) (question answered by certification to Supreme Court of Puerto Rico).

One court described it as, and I quote,

> "...elemental that a contract of a common carrier to transport a passenger to a given destination imposes on the carrier an obligation to transport the passenger to his destination in a reasonably safe manner." Heredia vs. Safeway Trails, Inc., 369 So.2d 418, 420 (Fla. App. 1979).

Corpus Juris Secondum takes an inconclusive view, and I quote,

> "A common carrier may be liable for injuries to its passengers not only on a tort theory but also

on a breach of contract theory. However, it has also been held that the carrier is liable only a tort theory and not on a breach of contract or breach of warranty theory." 13 C.J.S. Carriers, § 518 (1990).

(101) The only California case offered by the parties that discusses an implied contract for non-negligent transportation is Marshall vs. United Airlines, 35 Cal.App.3d 84 (1973).

Exportadora contends that Aviones acted as an independent contractor on behalf of Exportadora in providing transportation to the Japanese decedents. Exportadora argues that, under California law, there is rarely any basis upon which the principal may be held liable in tort, citing 2 Witkin, Summary of California Law, Agency and Employment, § 125.

Exportadora relies upon Marshall vs. United Airlines, 35 Cal.App. 3d 84 (1973) as establishing the rule that even a common carrier may not be held liable for the acts of its independent contractor.

(102) Plaintiffs suggest that Marshall may be distinguished under the facts of the present case. In Marshall, the claimant sought to hold United Airlines liable in damages for personal injuries suffered when she fell on an escalator in the public airport at San Francisco. Claimant had bought a round-trip ticket and was on her return from New York to Berkeley. She purchased her ticket from United. The ticket provided airline transportation for the return from New York to Berkeley. She was to change from United's flight in San Francisco to an SFO Airlines helicopter flight to Berkeley. While passing from the United area in a public airport on her way to the SFO helicopter facility, she took an escalator and was injured when she fell.

The California appellate court held that United's duty to the claimant after she disembarked from the aircraft was one of ordinary or reasonable care. However, United held no ownership or right or control or management of the property

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where claimant was injured.

The court then undertook to consider whether United had, by selling the ticket, including helicopter service between San Francisco and Berkeley, either expressly or impliedly contracted with the claimant to furnish non-negligent passage from New York until claimant's departure from the SFO helicopter facility at Berkeley.

The court was unable to find California authority on whether, under similar facts, an implied contract for non-negligent passage to the passenger's ultimate destination arises. But the court noted that elsewhere throughout the nation the rule seems to be well established.

Upon reviewing the authorities, the appellate court concluded that generally, in the absence of a special contract to the contrary, a carrier's responsibility is discharged by safe carriage over its own lines.

The mere sale of a through ticket over two or more connecting lines is not evidence of a joint contract between the two carriers sufficient to make one liable for the fault of the other.

However, the court went on to distinguish an earlier California case of Wheeler vs. S.F. & A. Railroad Company, 31 Cal. 46 (1866). That case held that, where several carriers combine their operations by mutual arrangements over all their lines upon one contract for a single price, each may be held liable over the entire distance.

The court in Marshall undertook to distinguish Wheeler concluding that United's agreement with the injured passenger provided only transportation to San Francisco and not beyond San Francisco to Berkeley.

(103) The present case is more like Wheeler. Exportadora agreed to transport the decedents round trip between San Diego and Guerrero Negro. The agreement did not separate the obligation into segments.

The Ninth Circuit in Schoenberg upheld Judge Irving's findings and stated, and I quote,

"...decedents did not make arrangements for legs of the trips separately." Schoenberg, 930 F.2d 781.

The evidence at trial has been consistent with Judge Irving's findings and the ruling of the Ninth Circuit.

(104) I conclude that Marshall must be distinguished on its facts. Exportadora agreed to transport the decedents round trip from San Diego to Guerrero Negro with return to San Diego. Exportadora substituted Aviones to undertake the return flight from Guerrero Negro to Tijuana only after Exportadora's aircraft, the Westwind, became unavailable.

The decedents were scheduled by Exportadora to make the flight aboard the Westwind, and the charter with Aviones amounted to nothing more than to provide Aviones as a substitute for the purpose of carrying out Exportadora's obligation to the decedents.

(105) I conclude California courts would follow the overwhelming rule and imply a covenant of non-negligent transportation in contracts of carriage between a common carrier and a passenger.

I recognize that a common carrier owes a duty of the highest degree of care. I have held that Exportadora had a duty to exercise ordinary or reasonable care toward the decedents in providing transportation on its corporate aircraft or on the Aviones aircraft which was substituted for the Westwind.

The implied covenant of non-negligent transportation should apply not only to contracts between common carriers and their passengers, but also to contracts between contract or corporate carriers and their passengers.

By its terms, the covenant only requires non-negligent transportation. The factual findings that I have made establish the cause of the accident to have been the pilot's negligence. The implied covenant of non-negligent transportation does nothing more than require a corporate carrier such as Exportadora to exercise ordinary and reasonable care for the safety of those who are accepted by Exportadora as passengers.

(106) An implied contractual duty of non-negligent transportation is not the same as an implied warranty of safe transportation. Courts uniformly hold that a carrier is not the insurer of the passenger's safety, Tolan vs. Era Helicopters, Inc., 699 P.2d 1265 (Alaska 1985); Hunt vs. Sun Valley Company, Inc., 561 F.2d 744 (9th Cir. 1977) (applying Idaho law).

There is no implied warranty of safe passage which would be breached even in the absence of negligence. 132 C.J.S. Carriers § 518 (1990).

Negligence remains the essence of both tort and contract theories of recovery.

(107) Under California law, one who voluntarily assumes a contractual duty agrees to carry out the duty in a reasonable manner. California Civil Code Section 1655 implies in a contract any term, quote,

> "...necessary to make a contract reasonable or conformable to usage."

In interpreting this section, California precedent has split between a strict test limiting the judicial creation of implied contract terms and a liberal test generally allowing such terms.

The modern trend seems to be toward the liberal test. See 1 Witkin, Summary of California Law, § 739-41 (9th ed. 1987).

However, even under the strict test established in Cousins Investment Company vs. Hastings Clothing Company, 45 Cal.App.2d 141 (1941), I conclude that a covenant of non-negligent transportation should be implied in the agreement of round-trip transportation made between Exportadora and the decedents in this case.

Using the five-part strict test established in Cousins, I conclude that such a covenant: (1) is indispensable to effectuate the intention of the parties; (2) was clearly within the contemplation of the parties; (3) can be justified on the grounds of legal necessity; (4) would have been made by the parties if

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attention had been called to it; and (5) is not completely covered by the contract.

(108) While contract or corporate carriers are not the insurers of their passengers' safety, I conclude that the agreement includes a covenant to transport the passengers in a reasonable and non-negligent manner.

This implied covenant is necessary to make the agreement reasonable and conforms to the usage and expectations of the parties.

(109) Under California law, a party to a contract cannot escape liability by delegating performance of contractual duties to an independent contractor, 1 Witkin, Summary of California Law, § 943 (1987). I quote:

> "[A] person who has assumed the contractual duty to perform a service for another cannot escape his contractual obligation to perform the service in a competent manner by delegating performance to another." Harold A. Newman Company vs. Nero, 31 Cal.App.3d 490 at 496 (1973).

This general rule on the non-delegability of contractual duties applies to the negligent performance by an independent contractor, quote:

> "One who contracts to perform an undertaking is liable to his promisee for the negligence of an independent contractor whom he delegates actual performance." Citing Capital Chevrolet Company vs. Lawrence Warehouse Company, 227 F.2d 169 (9th Cir. 1955).

If the promisee wants to be relieved of her obligation, she must gain the promisor's agreement to a modification. Unilateral action by the promisee is not generally sufficient to relieve her of contractual duties.

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(110) I conclude that the evidence fails to reveal any modification of the agreement for accommodations in transportation between Exportadora and the decedents. At no time were the passengers told that Exportadora would not have responsibility for their transportation back to San Diego.

At no time did any of the passengers agree to a modification of the agreement. Although they were introduced to a new pilot and observed the Aviones airplane, the passengers had no reason to believe that Exportadora had been relieved of responsibility for their transportation.

Exportadora employees or agents had met them in San Diego, arranged for accommodations in San Diego, carried them by van to Tijuana, flew them on the Westwind to Guerrero Negro, provided their accommodations at Guerrero Negro, introduced them to their new pilot, brought them to the Aviones airplane and arranged for an Exportadora van to be waiting in Tijuana to carry them to San Diego.

Nothing indicates that the passengers had anything to do with any arrangements for their travel and accommodations.

The agreement between Exportadora and the Japanese decedents was not modified, and the passengers continued to rely upon Exportadora to carry them safely to San Diego on their return from Guerrero Negro.

Exportadora was free to choose the vehicles, drivers or independent contractors it considered most appropriate to carry out its obligations under the agreement.

I conclude that Exportadora's choice of carriers did nothing to change its obligation of non-negligent transportation to the decedents.

(111) I conclude that Exportadora had a non-delegable obligation to transport Doctor Sugimoto, Doctor Kodani and Mr. Omachi in a reasonable and non-negligent manner. On the trip from San Diego to Guerrero Negro, Exportadora provided its company van and the company airplane, the Westwind.

On the return trip, Exportadora used a Cessna 340A chartered from Aviones de Sonora, an independent contractor, and planned to use the company van. Exportadora had the same

obligation in transporting the decedents from Guerrero Negro to San Diego as it had in transporting them from San Diego to Guerrero Negro: to see that the passengers were transported with reasonable care.

(112) Plaintiffs contend that Exportadora had a non-delegable tort duty toward the decedents. I reject Plaintiffs' arguments based on the peculiar risk doctrine but conclude that Exportadora had a non-delegable tort duty based on public policy grounds.

In California, the general rule of non-delegability for the negligence of an independent contractor is, quote,

> "...subject to exceptions of such wide scope that they leave only a small area in which the so-called general rule operates. Accordingly, it seems proper to say that non-liability is now the exception [and] the so-called general rule is followed only where no good reason is found for departing from it... Considerations of policy frequently call for such departure." 6 Witkin, Summary of California Law, § 1009 (1987).

(113) The Plaintiff contends that Exportadora had a non-delegable tort duty toward the passengers of XAKOA and is therefore liable for any negligence by Aviones de Sonora.

California courts find non-delegable tort duties in three specific categories: public franchise, statutory duty and peculiar risk. In addition, California courts may find a non-delegable tort duty in other areas based on public policy criteria.

The present case does not fall neatly into either of the three specific considerations. See Rozmajzl vs. Northland Greyhound Lines, 49 N.W.2d 501 (Iowa 1951) (public franchise); Maloney vs. Rath, 69 Cal.2d 442 (1968) (statutory duty).

The fact that a particular category of non-delegable duty does not apply does not preclude the Court from resting its conclusion on public policy grounds. Alaska Airlines, Inc. vs.

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Sweat, 568 P.2d 916 (Alaska 1977) (court rejects liability under Restatement (Second) of Torts § 428, but finds non-delegable tort duty based on policy considerations).

(114) The "peculiar risk" exception to the general rule that the defendant is not liable for the acts of an independent contractor is codified in Sections 413 and 416 of the Restatement (Second) of Torts. These provisions impose a duty to take "special precautions" when a defendant should know that an activity holds a "peculiar risk" of physical harm to others.

Section 413 imposes a direct duty on the defendant, which the defendant can delegate to the independent contractor. Section 416 imposes a vicarious, non-delegable duty on the defendant to take special precautions.

Together, these provisions hold a defendant liable for failure to take special precautions against peculiar risks, and the contractual delegation of the peculiar risk to the independent contractor serves only as a legal basis to obtain an indemnity from the independent contractor. See § 416, comment c.

The definitions of both "peculiar risk" and "special precaution" are identical for the two sections. See § 416, comment b.

California has adopted the Restatement in this area, Castro vs. State of California, 114 Cal.App.3d 503 at 510 (1981). Quote:

> "Whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others unless special precautions are taken is ordinarily a question of fact."

(115) Liability under the peculiar risk theory requires: (1) that the activity create a peculiar risk of harm unless special precautions are taken; and (2) that the defendant knew or should have known of the peculiar risk, Hughes vs. Atlantic Pacific Construction Company, 194 Cal.App.3d 987 at 998 (1987).

The general risk that an independent contractor might be

negligent in performing activity is not a peculiar one. To impose liability, the risk must be, quote:

> "...peculiar to the work to be done and arising out of its character or out of the place where it is to be done." See § 413 Restatement, comment b.

To be peculiar, the risk does not have to "necessarily and inevitably" arise but can be one likely to arise from the activity. See § 416, comment e.

> "'Peculiar' does not mean that the risk must be one which is abnormal to the type of work to be done or that it must be an abnormally great risk. It has reference only to a special recognizable danger arising out of the work itself." Restatement (Second) of Torts, § 413, comment b.

(116) The California Supreme Court has suggested that "special risk" is a more appropriate term, Aceves vs. Regal Pale Brewing Company, 24 Cal.3d 502 at 509, n. 2 (1979).

> "Where it is the manner in which a subcontractor performs the work as opposed to the work itself that introduces the danger to an otherwise safe activity and work place, the contractor is not vicariously liable." Ek vs. Herrington, 738 F.Supp. 357 (D.C. Idaho 1990).

Negligence by the independent contractor in performing the activity is sometimes referred to as "collateral" or "casual" negligence which does not trigger liability under the peculiar risk theory.

(117) One state appellate court has applied §§ 413 and 416 to aircraft case, Fagundes vs. State, 774 P.2d 343 (Idaho

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App. 1989). In that case, the State of Idaho contracted with a helicopter firm to fly state employees over park areas to count game. The helicopter crashed and the pilot, an employee of the contractor, was killed. The court rejected peculiar risk liability on two independent grounds.

The court found that, under Idaho law, a defendant did not owe a duty to the employee of an independent contractor. The court based its ruling on the perceived unfairness of worker's compensation law limiting the liability of the independent contractor but not that of the defendant general contractor.

California takes the opposite view. In California, the law is clear, quote,

> "...that an employee of an independent contractor... may sue the contractor's employer under the peculiar risk doctrine." Castro vs. State of California, 114 Cal.App.3d 503 at 514 (1981).

To the extent that the Fagundes decision was based on the fact that the plaintiff was the employee of the independent contractor, the decision does not apply to the present case. However, the court rested its decision on the alternate grounds that the danger of a helicopter crash in the wilderness was not a special risk in a contract for transportation by helicopter over wilderness areas.

(118) In the present case, Plaintiffs have the burden of proving a special risk in the flight from Guerrero Negro to Tijuana beyond the generally recognized dangers of air travel itself.

I conclude that the risk that a plane might crash through pilot error is a type of "collateral" risk outside the scope of the special risk doctrine.

The fact that fog at Tijuana might have been foreseeable to Exportadora or to Pilot Raul Gutierrez Tellez does not change this result. As the transcript of the conversation between the

pilot and the air controller indicates, the pilot knew that he had the option to execute a missed approach at any time. It was not a special risk that the pilot would deviate from the glide path or an ILS approach to the airport or fail to execute the required missed approach that caused this accident.

(119) As I have earlier suggested, Alaska Airlines, Inc. vs. Sweat, 568 P.2d 916 (Alaska 1977) holds that, in addition to the specific categories of non-delegable tort duties, a non-delegable duty may be found on general policy grounds.

Plaintiffs argue that Exportadora controlled the flight and is responsible for its departure under adverse weather conditions.

I have found that Exportadora scheduled the flight but that the conduct of the flight was under the control of the Aviones pilot, Raul Gutierrez Tellez. The decision to undertake the flight, how the flight would be conducted and whether under the restricted conditions a landing at Tijuana airport should be attempted rested with the pilot, not with Exportadora.

I have found that Aviones was an independent contractor under its charter with Exportadora. However, as Alaska Airlines vs. Sweat holds, a party may be liable for the negligence of an independent contractor if public policy requires that a non-delegable tort duty exists. California authorities suggest a number of factors to consider in determining if a non-delegable tort duty exists on the facts of a specific case, and I quote:

> "Some of the principal ones are that the enterprise, notwithstanding the employment of the independent contractor, remains the employer's because he is the party primarily to be benefited by it, that he selects the contractor, is free to insist upon one who is financially responsible and to demand indemnity from him, that the insurance necessary to distribute the risk is properly a cost of the employer's business and that the performance of the duty of care is of

great importance to the public." Van Arsdale vs. Hollinger, 68 Cal.2d 245 at 253 (1968).

(120) In the present case, Exportadora enjoyed the primary benefit of the transportation of the decedents. Mr. Omachi was the representative of a major purchaser of Exportadora's salt and the transportation of professors, Doctor Sugimoto and Doctor Kodani was arranged at the request of Mitsubishi, a major stockholder.

Exportadora could use any vehicles which suited its purpose, including the company van, the company plane or air taxi companies.

On those occasions when Exportadora elected to use an air taxi company, Exportadora was free to use only financially responsible companies or require indemnity. Exportadora was better situated to analyze the amount and risks of the transportation it was providing to determine the appropriate level of insurance coverage.

Exportadora was in a better position to balance the risks involved against the benefits it gained in continuing to provide transportation to potential customers and other guests.

Finally, imposing a non-delegable duty of care on a corporation that operates a regular transportation link assures, quote,

> "...that, when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent contractor." Maloney vs. Rath, 69 Cal.2d 442 at 446 (1968).

Based on the foregoing public policy factors, I conclude that Exportadora had a non-delegable duty of ordinary care in the transportation of the decedents under California law.

(121) Plaintiffs suggest that, in the transportation

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industry, a carrier may not delegate its duty to transport passengers safely. In support of that contention, Plaintiffs cite Alaska Airlines vs. Sweat, 568 F.2d 916 (Alaska 1977). In the Sweat case, the plaintiff purchased a ticket from Alaska Airlines to fly from Cordova to Cape Yakataga, Alaska. Alaska Airlines, a common air carrier, had previously hired Chitina Air, an air taxi company, to service a number of the airline's smaller routes, including the flight from Cordova to Cape Yakataga. Quote:

> "There is not indication that Alaska Airlines controls the maintenance of the planes, the hiring of pilots or the day-to-day affairs of Chitina. However, Alaska Airlines provides the schedule, the tickets and rates, and Chitina then charges Alaska Airlines an hourly rate." Sweat at 922.

(122) Plaintiff in Alaska Airlines vs. Sweat was seriously injured when the aircraft encountered zero visibility conditions and crashed into the Bering Glacier. Although Sweat discusses the important responsibility a certificated common carrier has for the safety of its passengers, I conclude that much of the rationale of Sweat should apply to the facts of the present case.

In both instances, the air taxi company operated as an independent contractor with the ultimate responsibility for pilot qualifications and aircraft maintenance.

In both instances, however, the passenger made an agreement with the defendants that the defendant would transport them.

I conclude that Sweat provides additional support for the conclusion that Exportadora as a corporate carrier had a non-delegable tort duty toward its scheduled passengers.

(123) Plaintiffs argue that Exportadora should be liable for the negligence of Pilot Gutierrez on a theory of apparent or ostensible agency. An ostensible agency is established, quote,

> "...when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent." Cal. Civ. Code § 2300.

The principal is liable to persons who reasonably rely on the ostensible agency to their detriment. Cal. Civ. Code § 2334.

Ostensible agency and agency by estoppel are identical legal concepts, 2 Witkin, Summary of California Law, § 40 (9th ed. 1987).

Despite these statutes, Exportadora, quote:

> "...respectfully submits that... the 'estoppel to deny agency theory' [has] absolutely no binding effect under the law of the State of California."

Exportadora cites Professor Witkin's treatise for the proposition that a principal is rarely liable for the torts of an ostensible agent. However, the very next sentence in Professor Witkin's treatise clarifies that this is because, quote,

> "...the essential element of reliance upon the representations of conduct of the principal is usually lacking." 2 Witkin, Summary of California Law, § 125 (9th ed. 1987).

Where such a reliance is shown, the principal is liable to the injured party under clearly established California law.

(124) In Croce vs. Bromley Corporation, 623 F.2d 1084 (5th Cir. 1980), Mustang Aviation, a common carrier, agreed to transport the Jim Croce Group to various concert locations. When Mustang's plane was unavailable, Mustang arranged for Roberts Airways to provide a replacement plane and pilot. When the plane crashed due to pilot negligence, Mustang was held liable on a theory of agency by estoppel. The Court of Appeals upheld the District Court findings, quote:

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"...there is no credible evidence that [Mustang] informed the Croce Group that Roberts was the owner and operator of the substitute or that Roberts was solely responsible for the flight, nor did anyone secure the Croce Group's agreement to the change from the original contract. While the evidence on this point is sparse, the reasonable inferences from the evidence left the court with the firm belief that no such communication occurred.

No one in the Croce Group knew or should have known Mustang was not responsible for the flight or that Roberts was flying it in Mustang's place." See Croce at 1088.

(125) In Roberts vs. Gonzalez, 495 F.Supp. 1310 (D.C.V.I. 1980), Caribbean Executive Airlines, a common carrier, agreed to transport the plaintiffs round trip between San Juan and St. Thomas. Ground transportation between the airport and midtown was provided in both locations.

When Caribbean's plane was unavailable, Caribbean arranged for Conquest Airways to transport the plaintiffs by air. Caribbean retained the responsibility for ground transportation.

The plane crashed due to engine malfunction and pilot error in responding to the malfunction. Caribbean was held liable on a theory of agency by estoppel. The court found numerous manifestations by Caribbean, the principal, to the passengers that Conquest was its agent.

"Among those manifestations is the total absence of dealings with Conquest by the passengers. Instead, their transfer was conducted entirely by Caribbean officials and therefore left the impression that they were still Caribbean's passengers. A similar conclusion is inferable from the fact that the Conquest flight was an

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> unscheduled flight for the Caribbean passengers alone. This perspective was also reinforced by Caribbean's retention of the responsibility for the passengers' ground transportation in San Juan and St. Thomas. A final manifestation of apparent authority was the fact that the passengers were permitted to retain their Caribbean tickets and to utilize them on the Conquest flight." See Roberts, 1314-15.

(126) In the present case, Exportadora agreed to transport the decedents round trip between San Diego and Guerrero Negro. Exportadora provided all of the decedents' accommodations in San Diego and Guerrero Negro. Exportadora provided ground transportation between San Diego and Tijuana.

On the flight from Tijuana to Guerrero Negro, Exportadora flew the decedents on separate flights of the Westwind. When the Westwind was unavailable for the return flight, Exportadora arranged for Aviones de Sonora to transport the five scheduled passengers.

Exportadora told the passengers the company van would be waiting for them in Tijuana to take them to San Diego.

While at least some of the passengers were introduced to the new Aviones pilot the night before the flight, all the scheduled passengers knew at some time before they boarded the flight that they would not be flying on the Westwind to Tijuana.

I conclude that the passengers were not informed that Aviones would be assuming Exportadora's obligations or responsibility for the flight.

All transportation and accommodations between San Diego and Guerrero Negro up to the flight of XAKOA from Guerrero Negro had been arranged by Exportadora. Exportadora continued to arrange transportation after the expected arrival of XAKOA in Tijuana.

I conclude that the conduct of Exportadora induced a reasonable belief in the passengers that Exportadora was

responsible of XAKOA from Guerrero Negro to Tijuana.

I conclude that the passengers relied on the continuing responsibility of Exportadora for their transportation by boarding the flight. These conclusions establish the required elements of ostensible agency under California law.

(127) Exportadora relies upon Marshall vs. United Airlines, 35 Cal.App.3d 84 (1973) to argue that a carrier's duty ends once the passenger has safely departed from the carrier's aircraft.

As I have noted, in Marshall the plaintiff attempted to hold United Airlines liable for the alleged negligent maintenance of an escalator in the San Francisco-Oakland airport. After disembarking from a United flight and walking down the airport corridors, the plaintiff fell and injured herself on the escalator.

The court held that United had no duty to maintain the escalator and had safely discharged its common carrier obligations toward the plaintiff.

Exportadora argues that its obligation toward the decedents ended when the decedents boarded the Aviones plane. I find Marshall distinguishable on the issue of ostensible agency. There was no allegation in Marshall that United's conduct or statements had led the plaintiff to believe that United was responsible for travel beyond its facility at San Francisco.

(128) Exportadora argues that, in order for the doctrine of ostensible agency to apply, passengers must pay money for their tickets and the defendant must be a common carrier. Although both Croce and Roberts involved common carriers, Exportadora has not offered any authority for the proposition that the doctrine of ostensible agency is so limited.

I have previously held that Exportadora gained valuable consideration for its transportation of the decedents including the possibility of increased sales of salt to Asahi Chemical and stockholder good will.

I conclude that Exportadora is liable for the negligence of the Aviones pilot, Raul Gutierrez Tellez, based on the theory of ostensible agency.

(129) Plaintiffs argue that the pilot negligence should be inferred under the doctrine of res ipsa loquitur. In California, the doctrine of res ipsa loquitur applies if the accident was: (1) the kind that ordinarily does not occur in the absence of negligence; (2) caused by an instrument in the exclusive control of the plaintiff; and (3) not caused by actions of the plaintiffs. Cal. Evid. Code § 646, Law Revision Comments (1970).

If a plaintiff establishes these three prerequisites and the defendant does not produce "evidence which would support a finding that [the defendant] was not negligent or that any negligence on [the defendant's] part was not a proximate cause of the occurrence," the trier of fact must find negligence. Cal. Evid. Code § 646(c).

If the defendant does not come forward with such rebuttal evidence, the trier of fact cannot find liability unless the trier finds, quote,

> "...that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant." Cal. Evid. Code § 646(c)(2).

A defendant cannot rebut a prima facie showing of res ipsa loquitur with mere speculation about possible alternate causes of the crash, Newing vs. Cheatham, 15 Cal.3d 351 at 365 (1975); Mittelman vs. Seifert, 17 Cal.App.3d 51 at 80 (1971). In more simple terminology, the doctrine allows an inference against the defendant based on unrebutted circumstantial evidence. Once this inference is rebutted, the trier of fact is required to weigh all of the evidence, circumstantial and direct, to reach a result.

(130) Plaintiffs cite numerous authorities holding an aviation common carrier to a higher evidentiary standard to rebut a passenger's prima facie showing of res ipsa loquitur, Irwin vs. Pacific Southwest Airlines, 133 Cal.App.3d 709 (1982); Roberts vs. Trans World Airlines, 225 Cal.App.2d 344 (1964); Colditz vs. Eastern Airlines, Inc., 329 F.2d 180 (5th

Cir. 1969).

I have previously held that Exportadora did not act as a common carrier in transporting the decedents, but rather as a corporate carrier under an analogy to the facts of Brown vs. Feather River Lumber. Such carriers are required to exercise ordinary care in the transportation of passengers.

Cases modifying the traditional res ipsa rules to reflect a common carrier's duty to exercise utmost care are inapplicable. In particular, I reject Plaintiffs' argument that an inference of negligence arises in this case from an injury to passengers. The decision in Foss vs. United States, 623 F.2d 104 (9th Cir. 1980) clearly holds that there is no presumption of pilot negligence from a crash under California law.

Like the trial court in Foss, I have based my rulings on the evidence produced at trial rather than an inference of presumption of negligence.

(131) In Newing vs. Cheatham, 15 Cal.3d 351 (1975), the California Supreme Court held that the doctrine of res ipsa loquitur applied as a matter of law to the crash of a private airplane near Tijuana, Mexico. The first condition was met because the plane took off in clear weather and there was, quote,

> "...no evidence that weather conditions contributed in any way to the crash of the plane." See Newing at 361.

The court distinguished cases in which natural conditions could have affected the operation of the aircraft. See Newing at 361, note 4.

The second factor was established as a matter of law because the pilot was in the exclusive control of the aircraft. There was no reason to suppose that any other person was operating or controlling the plane at the time of the accident, Newing at 362.

Plaintiffs argue that the decision in Newing establishes Exportadora's liability in the present case.

(132) I conclude that the present case is distinguishable from Newing. Unlike Newing, the evidence is certain that Tijuana airport was restricted due to low visibility when XAKOA approached runway 09. This is not a case of an accident that ordinarily does not occur in the absence of negligence.

At trial, there was conflicting evidence from qualified expert witnesses about the issue of pilot negligence and causation. The NTSB report was unable to conclude that pilot error caused the accident. These evidentiary disputes and the possible effect of low visibility effectively rebut the first prerequisites to the application of res ipsa loquitur to this case.

In addition, Exportadora has presented expert testimony that XAKOA was flying a radar surveillance approach and that such an approach places the air traffic controller in effective control of the aircraft.

While I have considered and ultimately rejected this opinion in light of all the evidence, it nevertheless served to effectively rebut Plaintiffs' showing on the second prerequisite to the application of res ipsa loquitur to this case.

Therefore, I am required by Section 646(c)(2) to reach a decision based on all of the evidence.

(133) Because Exportadora's expert witnesses effectively rebutted the first and second prerequisites to a prima facie showing of res ipsa loquitur, I do not express any opinion about the legal effect of Plaintiffs' previous allegations that a fuel leak in the engine of the Cessna 340A caused the accident or Exportadora's suggestion that air induction icing caused the accident. See Newing, 15 Cal.3d at 363. Dean Prosser has stated that, quote,

> "A res ipsa case is a circumstantial evidence case which permits the [trier of fact] to infer negligence from the mere occurrence of the accident itself. Its first requirement is a basis of past experience which will permit the triers of fact to conclude that such events do not

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ordinarily happen unless someone has been negligent." Prosser, Res Ipsa Loquitur in California, 37 Cal.L.Rev. 183 at 191 (1949).

(134) I conclude that the present case involves complex and specialized aviation issues beyond the ordinary experience of triers of fact. Resolution of liability required the type of expert opinion and detailed evidence presented at trial. Accordingly, I reject Plaintiffs' claim of res ipsa loquitur.

(135) Plaintiffs have urged this Court to find that Pilot Raul Gutierrez Tellez was negligent per se for alleged violations of the aviation laws of Mexico and the United States.

The Secretary of Transportation of the United States is authorized by law to regulate the navigable air space of the United States to ensure the safety of aircraft, 49 U.S.C. § 1348(a).

Mexican air safety laws and regulations apply to the operation of Mexican aircraft in Mexican air space under generally applicable ideas of national sovereignty. On the border, Tijuana and San Diego air traffic control operations have executed an agreement titled, "San Diego Tracon and Tijuana Approach Control Letter of Agreement" effective June 15, 1981. This agreement requires Tijuana air traffic control to notify San Diego air traffic control that an arriving airplane is using the instrument approach to Tijuana and may require San Diego to monitor the altitude of the airplane. However, Tijuana, not San Diego, directs all approaches to Tijuana airport.

I conclude that the letter agreement does not constitute an assertion of control over the aircraft making an instrument approach to Tijuana.

I conclude that the United States of America did not assert regulatory control over the flight of XAKOA from Guerrero Negro to Tijuana.

I conclude that the Via Generales safety regulations establish the appropriate applicable air safety law in the present case. The legal effect of a violation of the Via Generales is

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determined by California tort law. Under California law, violation of a safety regulation establishes negligence per se, Haft vs. Lone Palm Hotel, 3 Cal.3d 756 (1970). California Evidence Code Section 669(a) provides that, quote:

> "The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance or regulation was adopted."

Although the statute establishes only a presumption of negligence from a violation, the presumption can only be rebutted by evidence that the defendant was a child acting in a reasonable manner for his or her age and experience or that the violation of the statutory regulation was more reasonable than compliance with the statute. Cal. Evid. Code § 669.

(136) The Plaintiffs argue that a number of alleged statutory violations are negligence per se in this case. Even if proved, the alleged lack of a copilot, departure before sunrise and failure to gather all available information were not causes of this accident.

I have previously found that the pilot was qualified under Mexican aviation law to make the flight from Guerrero Negro to Tijuana, that the plane had all the required equipment to do so and that no copilot was required.

Plaintiffs have failed to carry their burden of proof on the question of whether XAKOA departed with sufficient fuel reserves and whether XAKOA departed Guerrero Negro with inadequate information on forecasts for less than minimum

conditions in Tijuana.

Plaintiffs contend that the failure to follow the glide slope and failure to execute a missed approach were negligence per se. Plaintiffs cite federal air regulations rather than the Via Generales for these propositions.

I find that the pilot's failure to follow the glide slope and execute a failed approach constitute negligence under the evidence and the credible expert testimony presented at trial.

The Plaintiff has failed to carry its burden of proof that these acts constituted negligence per se under the rule of the Via Generales.

FINDINGS OF FACT ON DAMAGES

(137) Doctor Katsuo Sugimoto and Doctor Yoshihito Kodani were professor on the faculty of Tottori University of Hamasaka, Japan at the time of their visit to Guerrero Negro in late September 1987. Mr. Omachi was the manager of raw materials for Asahi Chemical Industry Company. All of the decedents were married with families.

(138) Hiroko Sugimoto, who was born in Japan on April 27, 1931, became acquainted with her future husband, Doctor Sugimoto, while was a child of 3 or 4 years. He proposed to her when she was 17, and she married Doctor Sugimoto when she was 20. Mrs. Sugimoto testified that, while many marriages in Japan were arranged, she and her husband married for love. The couple had two children: the oldest son, Mitsukini, and the youngest, Yasunobo, with whom the widow Hiroko now lives.

(139) Doctor Sugimoto became employed at the ministry of agriculture in Japan when he was 22 years old. Through self-study he was able to obtain his Ph.D by 1973. During his work with the ministry of agriculture he was assigned to Malaysia for a two-year period from 1962 to 1964 and 1967 to 1969 and for a two-and-a-half-year period from 1980 to 1982. On these assignments he provided technical aid for the development of rice crops. Doctor Sugimoto was also

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away from home on assignment in Thailand for six months in 1973.

(140) After 35 years at the ministry of agriculture, Doctor Sugimoto in 1982 became a member of the faculty in the Department of Agriculture at Tottori University. For a number of years since 1982, Doctor Sugimoto has been connected with the agricultural project at Guerrero Negro.

(141) Doctor Sugimoto did not use tobacco. When asked whether he used alcohol, Mrs. Sugimoto responded that he did not, but later qualified her testimony stating that he drank on social occasions or holidays. He was careful with his diet since he had high blood pressure. He received surgical operations on two occasions. On one occasion his condition was described by Mrs. Sugimoto as benign. On the other occasion he received an operation for cataracts on his eyes.

(142) Hiroko Sugimoto suffers from high blood pressure for which she takes medicine. She received a surgical operation for a thyroid condition and she has a light case of diabetes. She does not use either tobacco or alcohol.

Mrs. Sugimoto was examined on January 8, 1993 by Doctor Bressler, a qualified internist who treats geriatric patients. Doctor Bressler reviewed Mrs. Sugimoto's medical records, examined her and had a number of laboratory tests performed on her. He reviewed medical literature bearing upon her condition. He found she is now 61 years of age and has chronic diseases that will affect her life expectancy including diabetes, hypertension and elevated cholesterol. In his expert opinion, she has a ten-year life expectancy. I find his testimony credible and reliable.

I find that Mrs. Sugimoto is in poor health, suffers from chronic diseases that will shorten her life expectancy and that, at the time of trial, she had a ten-year life expectancy.

(143) Hiroko Sugimoto testified that on three or four occasions her husband slapped her. Later, she qualified her testimony to say that on several occasions he "physically admonished" her. This, she testified, had to do with the manner in which she disciplined her sons. Doctor Sugimoto thought she

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was not strict enough.

For approximately 12 years, Doctor Sugimoto's parents resided with their son and daughter-in-law. They were in bad health and required a good deal of care from Mrs. Sugimoto. Much of her enjoyment in life came from raising the children and in their accomplishments.

Her husband drove a motor vehicle, took her shopping several times a week. Before his death, they went on walking or day trips approximately once a month. Both enjoyed working in the garden at their home in Ibaraki.

Doctor Sugimoto planned to remain a professor at Tottori University until he would be compelled to retire at the age of 65. He expressed interest upon retirement to return to Malaysia and work for perhaps five years but had no definite plans.

His hobby was to create tanka, a form of Japanese poetry. Indeed, Doctor Sugimoto published a book of poetry. At the time of his death in September 1987, Doctor Sugimoto was 61 years of age.

(144) Kimiko Kodani was born in Japan on May 4, 1935. She first met her future husband, Doctor Kodani, in 1947 and a marriage was arranged for the two of them. She found her husband to be very kind, jolly and well liked. She testified that he was a good person, generous to his wife and others.

Doctor Kodani and his wife had two daughters: Mayu, the oldest, and the second daughter, Kyoke. After the marriage, Doctor Kodani's parents moved in with their son and daughter-in-law. Doctor Kodani's father died nine years ago, but Mrs. Kodani continues to care for Doctor Kodani's mother who is now 81 years of age.

(145) Doctor Kodani was the oldest son in his family and during his life his home became a center for family gatherings which were happy events. Doctor Kodani's hobbies included golf and bicycling. He loved sports and he loved to sing.

(146) Doctor Kodani obtained a Ph.D in agriculture in 1977. He specialized in hydrology and irrigation research. He

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graduated from Tottori University in 1954 and became a member of the faculty as an assistant professor in 1977. He became well known for research in his field and made presentations at professional meetings. In 1980, he went to the United Arab Republic for one month to provide assistance. Doctor Kodani would have retired at 65 from his position as professor at Tottori University. He had nine years until retirement and had no specific plans of employment at that time. Her husband at the time of his death was 56 years of age. He had been in good health.

(147) Kimiko Kodani relied upon her husband for family support. However, she held several part-time jobs as a dressmaker and a nurse's aid. Her husband helped her at times with the household duties and set aside 10,000 yen per month from his salary into savings.

(148) Kimiko Kodani suffered depression and an attack of osteomyelitis following the death of her husband. She attributes her condition to the loss of her husband. Her sexual relations with her husband were enjoyable, and she continues to miss her husband's company and support.

(149) Kuniko Omachi married Hideo Omachi in 1985 and the couple had one child. Mrs. Omachi was employed by Tokyo Marine Fire Insurance, but after her marriage she relied on her husband for support.

Hideo Omachi was employed as section manager in the purchasing department of Asahi Chemical Industry, Limited, Japan's largest chemical company. In his position, Mr. Omachi was required to travel frequently to the Soviet Union, China, Europe and the United States and on the occasion of his death, September 30, 1987, to Mexico.

(150) Mr. Omachi was sociable, sincere and considerate. He liked to sing and at the university belonged to a mountaineering club. He became a golfer and on one occasion won a company tournament. But his dream was to become director of the company which employed him.

When not traveling, he spent long hours at work, leaving at 7:30 a.m. in the morning and returning home at 8:30

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p.m. and often later. When he worked overtime, about twice a week, he would arrive home at 11:00 p.m. or midnight. When he was home and particularly during the pregnancy of his wife, Mr. Omachi was helpful in performing household chores, cooking and entertaining.

(151) Shortly before undertaking his business trip to the United States and Mexico, Mr. Omachi had been reassigned by Asahi to a section that dealt with salt. He began to study salt and planned to visit Exportadora's salt plant in Mexico. In September 1987, Mr. Omachi traveled to the United States with Mr. Takeya, a member of the Asahi board of directors. Mr. Omachi expected to introduce Takeya to American business contacts for Asahi Chemical.

The arrangements for Mr. Omachi's travel from San Diego to Guerrero Negro to visit Exportadora's salt plant were made through Mr. Matsushita of Mitsubishi. As I have noted, Mitsubishi is 49 percent owner of Exportadora.

(152) At trial, the Plaintiffs and Defendant Exportadora offered the testimony of economic experts on the damage claims. The methodology employed by the two experts in arriving at their opinions on economic losses differed widely.

(153) Doctor Lowell Bassett qualified as Plaintiffs' expert economist. Upon comparison of interest rates on Japanese government bonds for the period of 1966 to 1990, Doctor Bassett found the interest rate over the period of time to average 7.08 percent. Wage increases over the same period, 1966 to 1990, he found to average 8.48 percent.

In Doctor Bassett's opinion, wages have increased in Japan slightly more than interest rates. Accordingly, in his opinion, comparison of interest rates with inflationary factors required that future economic loss should not be reduced to determine present cash value.

(154) Based on Doctor Bassett's research, including review of depositions and interviews with decedents' survivors, Doctor Bassett arrived at the opinion that each of the deceased would have contributed to their beneficiaries three and a half hours per week in non-market services, such as driving a car,

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making house repairs and performing maintenance.

(155) Doctor Bassett concluded, based on the information received from the survivors of Doctor Kodani and Doctor Sugimoto, that the information was not reliable enough to determine the consumption expenses of the deceased. He reconstructed consumption expense for each of the deceased based on information or data obtained through published materials not he average personal expenses in Japan. He then applied a formula on the increase in family personal expenses in the United States and taking into account increasing family size.

(156) Information furnished to Doctor Bassett by Mrs. Omachi appeared to be a sufficiently reliable basis to determine Mrs. Omachi's personal expenses. But when Doctor Bassett compared the information supplied by Mrs. Omachi with information obtained from Japanese published data, he found that the information provided by Mrs. Omachi averaged slightly less than the data based on the averages in Japan, and he opted to use the general average in making his calculations of Mr. Omachi's personal consumption.

(157) Doctor Bassett determined the earning capacity of each of the decedents based on historical data obtained from records of wages earned annually by decedents in the positions held by each up to the time of their deaths on September 30, 1987. To carry loss of income forward from September 30, 1987 until time of trial, Doctor Bassett calculated an average based upon the historical record of earnings and applied that average to determine economic loss to the time of trial.

(158) Since professors at Tottori University are required to retire at age 65, Doctor Bassett computed lost income caused by the death of Doctor Sugimoto and the loss of future income caused by the death of Doctor Kodani to age 65.

Based on his research and knowledge, Doctor Bassett formed the opinion that both professors would retire upon reaching the age of 65, but would undertake other work for an additional five years until reaching the age of 70. In his opinion, the earnings between first retirement and second

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retirement would be less and he fixed the amount of income to be earned in this period until second retirement at two thirds of earnings at the time of first retirement.

Although the widows of Doctor Kodani and Doctor Sugimoto knew little concerning their husbands' future plans beyond retirement from Tottori University, they reported to Doctor Bassett that their husbands planned to undertake some employment and he took this information into account in determining future economic loss.

(159) Doctor Bassett assumed Mr. Omachi would retire upon reaching the age of 62, although most Japanese employed by Japanese companies, according to published statistical data in Japan, retire between ages 55 to 60. In 1985, according to statistical data, approximately 95 percent of all Japanese industries had in place a mandatory retirement age between 55 years and 60 years. Doctor Bassett assumed that Japan's aging population, resulting in fewer young people in proportion to numbers of older persons, would cause the age of retirement from Japanese companies to rise to 62 in the future.

(160) Doctor Bassett obtained tables of life expectancy from publications in Japan and calculated a life expectancy:

...for Mr. Omachi of 35.74 years until age 77.47.

...for Doctor Kodani of 23.13 years until age 79.16.

...for Doctor Sugimoto of 18.73 years until age 80.3.

Relying on life expectancy tables, Doctor Bassett assumed that each of the wives would have outlived their husbands.

In determining family size, he included Mrs. Omachi's daughter who was born in 1988. He was also aware that Mrs. Sugimoto was now living with her son, but expressed doubt that Doctor Sugimoto was supporting the son.

Accordingly, Doctor Bassett computer an alternate determination excluding the son from the Sugimoto claims.

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(161) Doctor Bassett disclosed that his computation of five hours per week for care and guidance of Mr. Omachi's child born in 1988 was received from Plaintiffs' attorney, Mr. Foor, and based upon the attorney's instruction. He calculated the sum of $130,828 for lost care and guidance. He conceded that benefits based upon lost care and guidance are rarely applied.

(162) Doctor Bassett conceded that his calculations have been revised several times. He had also hoped to obtain information from the employers of the decedents, but that information was not forthcoming, so he was forced to compute averages based on historical data.

Doctor Bassett recognized that Japan is now in a recession and some economists believe that economic cycles, when taken into consideration with other economic factors, lead to more accurate results on economic losses. Doctor Bassett however believes that, in the long run, the long period is more reliable.

(163) Doctor Brodshatzer qualified as an expert economist and testified for Exportadora. In order to compute economic loss to the survivors of Doctor Sugimoto, Doctor Kodani and Mr. Omachi, Doctor Brodshatzer extensively reviewed publications containing statistical data having to do with Japanese economic and business conditions.

In Brodshatzer's opinion, Doctor Lowell Bassett has not evaluated the impact of retirement upon economic losses to the Plaintiffs from the deaths of Doctor Sugimoto, Doctor Kodani and Mr. Omachi.

Doctor Brodshatzer also expressed his opinions that Doctor Bassett had applied recognized economic methodology in an inconsistent manner and has failed to consider cyclical trends which necessarily bear on economic losses.

(164) Doctor Bassett stated his opinion that no discount factor should be applied to reduce future economic losses to present value. In the period from 1966 to 1990, comparison of interest rates in Japan averaged 7.08 percent for that period, and wage increases averaged out for the period at 8.48 percent. On

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the basis of this Japanese statistical data, Doctor Bassett reached an opinion that the discount factor amounted to zero.

(165) According to Doctor Brodshatzer, in the 15 years from 1966 to 1981, wage increases in Japan have exceeded interest rates, but in 1981 that trend was reversed and, since that date, interest rates have exceeded wage increase in Japan. Doctor Brodshatzer analyzed Japanese statistical data relating to interest rates and wage increases in the period 1966 to 1990. His approach, however, was to compare interest rates with wage increase in five-year increments. His calculations disclose:

In the period 1966 to 1970, interest rates rose at 7.02 percent, wage increases 9.82 percent and the difference was that wage increases rose 2.8 percent higher than interest rates.

In the period 1970 to 1975, interest rates rose at 7.81 percent, wage increases rose at 18.42 percent and the difference was that the wage increase in that five-year period rose 10.61 percent over interest rates.

In the period 1975 to 1980, interest rates rose at 8.04 percent, wage increase rose at 8.05 percent and the two rates of increase, wage and interest, were even.

In 1980 to 1985, interest rates rose at 7.75 percent, wage increase at 3.97 percent, and the interest rates exceeded wage increase by 3.78 percent.

In the period 1985 to 1990, interest rates rose 5.36 percent, wage increase rose 3.07 percent, and that period interest rates exceeded wage increases by 2.29 percent.

(166) In Doctor Brodshatzer's opinion, since the number of years to date of retirement would vary with each of the deceased, the remaining years of work life expectancy for each decedent would also vary.

Assuming that each decedent would be available for employment until the age of 70, the rate of discount to present cash value would vary as to each of the decedents.

(167) Doctor Brodshatzer based his determinations of lost income from the date of the fatal accident September 30, 1987 until the time of trial based on statistical data of professors' earnings in Japan and from the wage increases of

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companies employing more than 5,000 persons.

(168) Doctor Bassett and Doctor Brodshatzer differed as well in the method followed by each in determining consumption expense. Doctor Bassett's approach was to obtain statistical data from Japanese sources of personal expense and apply a formula based upon the number of family members to project personal consumption of each decedent.

After interviewing Mrs. Sugimoto and Mrs. Kodani, Doctor Bassett sought to obtain additional information in order to determine the personal consumption for Doctor Sugimoto and Doctor Kodani. When he was unable to obtain further information, he concluded the information available was unreliable and selected another method of computation. He was satisfied, however, that the records of household expenses maintained by Mrs. Omachi was sufficiently reliable to determine Mr. Omachi's consumption expense, but upon comparing results from the alternate method, he opted to apply the same method to determine Mr. Omachi's personal consumption as he employed in determining the personal consumption of Doctor Kodani and Doctor Sugimoto.

(169) Doctor Brodshatzer relied upon the information provided by Mrs. Sugimoto, Mrs. Kodani and Mrs. Omachi. He found the information was sufficiently reliable to determine personal consumption following this method. In support of his methodology in estimating personal consumption, he expressed a preference for using information exposed to examination by counsel. The information which he relied upon for the most part was found in the depositions of Mrs. Sugimoto, Mrs. Kodani and Mrs. Omachi, together with corrections made to their deposition testimony.

(170) Doctor Brodshatzer included pension payments as an offset to economic losses. Plaintiffs object on legal grounds under the collateral source doctrine and Doctor Bassett did not account for pension benefits in determining economic loss.

(171) I find that Doctor Brodshatzer's computations are more reliable than Doctor Bassett's. It is true that the period beginning in 1966 and ending in 1975 wages exceeded interest

rates. But beginning in 1981 and continuing until 1990, interest rates have increased more than wage rates have increased. The cyclical trend beginning in 1980 should be taken into account in order to make computations of economic loss more accurate, and reliable and future economic losses must be discounted to present cash value.

(172) I find that Doctor Bassett has not considered statistical data indicating that wages of older persons in Japan increase less rapidly than younger persons. Doctor Brodshatzer's computation of lost income from September 30, 1987 based on statistical data of the earnings of university professors in Japan, in computing economic losses for the decedents, Doctor Sugimoto and Doctor Kodani, and Brodshatzer's use of the wage increases of employees in companies employing more than 5,000 people and computing economic loss for the decedent, Omachi are more reliable.

I also find that the methodology applied by Doctor Bassett to determine the estimated personal consumption of decedents to be unreliable. Doctor Brodshatzer's estimates based on evidence provided by the family members of the decedents, I find to be more reliable.

(173) I find that Doctor Sugimoto on several occasion, because of his work, lived apart from his wife for as long as two years. He left her to care for his aging parents, a difficult duty since the parents required much attention.

I find as well that Doctor Sugimoto was sometimes as not as caring or pleasant to his wife and provided her with little company and companionship. I find Mrs. Sugimoto entitled to the sum of $20,000 per year for noneconomic losses reduced to present cash value.

(174) Doctor Kodani and Mr. Omachi were more caring and generous to their wives; however, both Doctor Kodani and Mr. Omachi were ambitious and driven by their efforts to obtain recognition and advancement in their work. Omachi in particular worked long hours, sometimes returning home at 11:00 p.m. or midnight.

I find Mrs. Kodani and Mrs. Omachi entitled to the sum

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of $25,000 per year for noneconomic damages reduced to present cash value.

CONCLUSIONS ON DAMAGES

(175) While I accept Doctor Brodshatzer's computations for past economic losses brought about by the deaths of Doctor Sugimoto, Doctor Kodani and Mr. Omachi, I conclude that reduction of economic loss by the amount of pension benefits which have been received by the survivors is a reduction of income received from a collateral source. Under California law, pension plan benefits are considered to come from a collateral source and should not be used to offset tort damages, Hume vs. Lacey, 112 Cal.App.2d 147 (1952).

(176) I conclude that Doctor Bassett's projection of retirement ages of decedents is largely unsupported by the evidence and is contrary to statistical data or information. Doctor Brodshatzer projected the initial retirement of Professor Sugimoto and Professor Kodani at 65, the mandatory retirement age of professors at Tottori University. He determined that Mr. Omachi would retire from Asahi Chemical at the age of 60.

I conclude that the evidence of future employment and compensation of the decedents beyond retirement to be so uncertain and indefinite that future economic loss cannot be estimated within any reasonable probability or amount.

(177) A claim is made on behalf of Eri Omachi, the daughter of decedent Omachi. Eri was born some months after the death of her father. The claim is supported on nothing more than instructions given by Plaintiffs' counsel, Mr. Foor to Doctor Bassett to include five hours per week of special services lost to Eri Omachi in computing damage estimates. I reject this claim as unsupported on the information presented at trial.

(178) In a recent air crash case, the Ninth Circuit Court of Appeals clarified the California law of damages in a wrongful death case, and I quote,

"In California, the wrongful death plaintiff may

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recover 'lost present and future economic support as well as the pecuniary (as opposed to sentimental) value of such factors as lost comfort, society, companionship, care and protection.' Notwithstanding the fact that it is the pecuniary value of lost society, comfort and care that is recovered in a wrongful death action, the California Supreme Court labeled these damages as non-pecuniary because they do not have an ascertainable economic value. To recover for the loss of society, comfort and care, however, the plaintiff must establish the pecuniary value of such loss and the amount is monetarily quantified. Under California law, the damages for wrongful death must be reduced to present value." In Re Air Crash Disaster Near Cerritos, California, 982 F.2d 1271 at 1278 (9th Cir. 1992).

(179) Neither party has presented evidence on the appropriate discount rate for noneconomic damages, and Plaintiffs seem to argue that the Court should not discount noneconomic damages at all.

As the Ninth Circuit ruled in Cerritos, noneconomic damages must be discounted to present value in California. The discount rate should reflect the rate of return over inflation an ordinary investor seeking reasonable security could realize, Fox vs. Pacific Southwest Airlines, 133 Cal.App.3d 565, 568, n. 2 and 570, n. 5 (1982).

(180) In calculating economic damages, Doctor Brodshatzer applied a three percent discount rate to future nonmarket services. I find that, for the purpose of selecting a proper discount rate, nonmarket services are analogous to noneconomic damages. I have discounted the noneconomic damages to present value using three percent as the proper discount rate.

(181) Mrs. Mayumi Nukiwa is Doctor Kodani's eldest

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daughter. I assume that Mrs. Nukiwa is an heir entitled to recover for the death of Doctor Kodani under California Code of Civil Procedure § 377. Ms. Nukiwa's claims of economic damages are by reason of increased telephone and travel expenses to console her mother and her grandmother and the loss of expected gifts from Doctor Kodani to Mrs. Nukiwa and her children. I find that these claims of economic loss are too speculative and tenuous.

(182) Mrs. Nukiwa claims noneconomic damages as well. Since her marriage in 1982, Doctor Kodani and Mrs. Nukiwa visited together only about twice a year. While I am sure she suffered considerable grief and sorrow at the loss of her father, their independent lives do not support a finding that she suffered a significant loss of care and companionship. See Krouse vs. Graham, 19 Cal.3d 59 (1977).

(183) Exportadora argues that this Court should apportion the award of noneconomic damages between Exportadora, Aviones, the government of Mexico, Cessna and Teledyne based upon the relative culpability of the parties. California law requires the apportionment of noneconomic damages in, quote,

> "...an action for... wrongful death, based upon principles of comparative fault." Cal. Civ. Code § 1431.2.

In Miller vs. Stouffer, 11 Cal.Rptr. 2d 454 (Cal.App. 1992), the California Court of Appeals ruled that Section 1431.2 did not apply to judgments based on vicarious liability.

Exportadora is liable not only for its own negligence but vicariously for the negligence of the pilot, Raul Gutierrez Tellez, based upon implied contract, non-delegable tort duty and ostensible agency theories. I find that Section 1431.2 is inapplicable to the present award.

(184) Plaintiffs contend without citing any authority that they are entitled to prejudgment interest on the award of damages. I conclude that, under California Civil Code § 3288,

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I have the discretion to award such interest and decline to do so in the present case. The damages were unliquidated until the time of judgment.

(185) For each of the three decedents, Sugimoto, Kodani and Omachi, Cessna settled for $25,000, Teledyne for $2,000 and Seguros Constitucion, the insurance agent for Aviones de Sonora, for $13,329.07. These total $40,329.07 for each Plaintiff or a total of $120,987.21 in total offsets. I find that these amounts should be offset against the awarded damages in this litigation.

COMPUTATION OF DAMAGES

(186) I find that the present value of the economic damage sustained by Mrs. Sugimoto is $342,175. I find that Mrs. Sugimoto's life expectancy is ten years from the date of trial. The trial occurred approximately five years and three months after the accident. I find that Mrs. Sugimoto's economic damages should be calculated for 15 years from the date of the accident. I find that Mrs. Sugimoto sustained a noneconomic loss of $20,000 per year. Reduced to present value, this annual loss results in noneconomic damages of $238,800. Mrs. Sugimoto's total damage amounts to $580,975.

(187) I find that the present value of the economic damage sustained by Mrs. Kodani is $604,239. I find that Mr. Kodani's life expectancy was 19 years from the date of the accident. I find that Mrs. Kodani sustained a noneconomic loss of $25,000 per year. Reduced to present value, this annual loss results in noneconomic damages of $358,000. Mrs. Kodani's total damage is $962,239.

(188) I find that the present value of the economic damages sustained by Mrs. Omachi is $1,435,222. I find that Mr. Omachi's life expectancy is 31 years from the date of the accident. I find that Mrs. Omachi sustained a noneconomic loss of $25,000 per year. Reduced to present value, this annual loss

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results in noneconomic damages of $500,000. Mrs. Omachi's total damage is $1,935,222.

(189) These economic damages which I now award should be reduced by the offsets received by each of the Plaintiffs and shall reduce the amounts awarded to each accordingly.

That concludes the findings and conclusions of my decision in this case.

(Proceedings concluded.)

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APPENDIX D

Opinion
Court Of Appeals
April 19, 1991

Before: William C. Canby, Jr. and Pamela Ann Rymer, Circuit Judges, and David F. Levi*, District Judge.

Opinion by Judge Rymer

SUMMARY

Sovereign Immunity/Conflict of Laws

Affirming a district court judgment denying dismissal of a wrongful death action, the court of appeals held that a foreign corporation was not immune from suit under the FSIA because the foreign entity was engaged in commercial activity having a substantial contact with the United States.

Appellant Exportadora de Sal, S.A. de C.V., is a Mexican corporation in which the Mexican government has a 51% ownership interest, and Mitsubishi Corporation of Japan owns the remainder. Exportadora maintained an office in San Diego, Calif., to communicate with outside parties on behalf of its plant in Mexico. Five relatives of the appellees traveled from San Diego to Exportadora's Mexican facility. Exportadora drove them from San Diego to the Tijuana airport and then flew them to Exportadora's plant on its own airplane. On the flight back, the plane crashed on United States territory near the Mexican border, killing all aboard. The district court denied Exportadora's motion to dismiss the action against it, claiming sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). The district court also denied Exportadora's motion for partial summary judgment on the grounds that the laws of Mexico applied to this case.

[1] Congress has declared that foreign states shall be

*The Honorable David F. Levi, United States District Judge for the Eastern District of California, sitting by designation.

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immune from the jurisdiction of the courts in this country unless the "commercial activity" and the "noncommercial tort" exceptions apply. [2] The commercial activity exception of the FSIA requires two components for it to apply: that the foreign entity be engaged in commercial activity, and that the commercial activity have substantial contact with the United States. [3] A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity is determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. [4] As such, the district court did not clearly err in finding that Exportadora arranged the transportation of the decedents to and from Mexico and transported them. Arranging transportation and transporting people is not an act that only a sovereign can perform. [5] Here, the Mexican government did not order Exportadora to assist it in carrying out a sovereign function. Instead, the Mexican government requested that Exportadora make its transportation link available. Exportadora's acquiescence in the request helped maintain goodwill with its majority stockholder, which is not an inherently public act. Thus, the district court correctly concluded that this transportation was commercial activity.

[6] A commercial acitivity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States. [7] The district court found that Exportadora maintained a regular air-and-auto link between its San Diego and Mexican offices as part of its commercial operations, that it arranged, through its San Diego offices, round-trip transportation for the decedents from San Diego to Mexico and that all five began their trips in San Diego. Given these findings, the district court correctly concluded that the relevant activity was the round trip. [8] The fact that the transportation was arranged through the San Diego office and the trip began in that city provided a sufficient nexus with the United States. [9] Because the court held that the FSIA's commercial excep-

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tion applied to Exportadora's claim of sovereign immunity, it did not need to address the other two statutory exceptions or the noncommercial tort exception.

[10] Because jurisdiction in this case was based on FSIA, not diversity of citizenship, federal common law applied to the choice of law rule determination. [11] Following the Second Restatement approach, California law applied since the injuries occurred in California, unless Mexico had a more significant relationship to the occurrence and the parties. [12] The court concluded that Mexico did not have a more significant relationship to this suit than California, the place of injury. While Mexico's policy limits the liability of its resident defendants in wrongful death actions, California's rule allowing full recovery serves the policies of providing full compensation for the survivors of its residents, and deterring wrongful conduct within its borders, said interest extending to all persons present within its borders. Although the district court followed the wrong path in deciding the choice of law issue, it correctly concluded that California law applied.

COUNSEL

John H. Stephens, Robbins & Keehn, San Diego, California, for the defendant-appellant.

Robin E. Foor, Belmont, California; Gerald C. Sterns, Sterns & Walker, San Francisco, California; Peter Nakahara, Nakahara & Hinoki, San Jose, California; Eugene Schneider, Oakland, California, for the plaintiffs-appellees.

OPINION

RYMER, Circuit Judge:

This is a consolidated appeal arising out of an airplane crash in San Diego, California as the plane approached an air-

port in Tijuana, Mexico. Exportadora de Sal, S.A. de C.V. ("Exportadora") challenges two rulings of the district court: (1) that Exportadora does not have sovereign immunity, and (2) that California law applies to these actions. We affirm.

I

Exportadora is a corporation which produces salt in Mexico. The Mexican government owns 51% of the corporation and the Mitsubishi Corporation of Japan owns the remainder. Exportadora maintained an office in San Diego, which communicated with outside parties on behalf of the Exportadora plant in Guerrero Negro, Mexico because the plant had no telephone service. In September 1987, five relatives of the plaintiffs traveled from San Diego to Exportadora's Guerrero Negro facility. Exportadora drove them from San Diego to the Tijuana airport and then flew them from there to Guerrero Negro on its own airplane. For the return trip, Exportadora's plane was unavailable. It chartered another plane from Aviones de Sonora, S.A., a Mexican corporation, to fly the travelers back from Guerrero Negro to Tijuana.

On that flight back, fog at Tijuana necessitated an instrument landing approach to the Tijuana airport. Such an approach requires an airplane to fly into United States airspace in order to land from the west. The plane failed to maintain a sufficient altitude and crashed short of the Tijuana airport, in United States territory near the Mexican border, killing all aboard. The plaintiffs in this action are the survivors of five travelers killed in the crash. Each group of survivors brought a separate action, two of them in state court. The state court actions were removed to federal court. *See* 28 U.S.C. § 1441(d) (removal of civil actions against foreign states).[1] Once all five actions were in federal court, the district court consolidated them.

[1]Exportadora is considered an "agency or instrumentality of a foreign state" under 28 U.S.C. § 1603(a) & 1603(b)(2), because Mexico owns a majority ownership interest in it.

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The five travelers made the trip to Guerrero Negro for different purposes. Ramon Schoenberg and Manuel Hernandez, both California residents, worked for a pump manufacturer and traveled to Guerrero Negro to solicit business. Hideo Omachi, a resident of Japan, was a purchasing agent for a Japanese company. Katsuo Sugimoto and Yoshihito Kodani, also residents of Japan, were representatives of Tottori University in Japan and were visiting an agricultural experiment in Guerrero Negro adjacent to Exportadora's salt production facility.

Exportadora moved to dismiss the suit, claiming sovereign immunity under the Foreign Sovereign Immunities Act (FSIA). The district court's denial of that motion was entered on July 7, 1989, and Exportadora timely appealed. As the action continued, Exportadora moved for partial summary judgment, claiming that the laws of Mexico apply to this case. The district court denied that motion, but granted permission to appeal pursuant to 28 U.S.C. § 1292(b), having determined that the choice of law issue "involves a controlling question of law as to which there is substantial ground for difference of opinion." This court granted permission to appeal the choice of law issue by order of January 18, 1990, and consolidated that appeal with Exportadora's appeal of the denial of its motion to dismiss.

II

We first consider whether Exportadora is immune from this lawsuit in United States courts, depriving the district court of jurisdiction. Because Exportadora made its motion to dismiss on the grounds that sovereign immunity applied, the denial of that motion is an appealable interlocutory order under the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam).

The existence of subject matter jurisdiction is a question of law reviewed de novo. *Kruso v. International Tel. & Tel.*

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Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, — U.S. —, 110 S. Ct. 3217, 110 L. Ed. 2d 664 (1990). We accept the district court's factual findings on jurisdictional issues unless they are clearly erroneous. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989).

[1] Congress has declared that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States" unless an exception applies. 28 U.S.C. § 1604. The relevant exceptions to which plaintiffs point are the "commercial activity" and the "noncommercial tort" exceptions. "Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S. Ct. 1077, 99 L. Ed. 2d 236 (1988).

The commercial activity exception of the FSIA provides that a foreign state is not immune from suit in any case

> [1] in which the action is based upon a commercial activity carried on in the United States by the foreign state;
>
> [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;
>
> [3] or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). If the commercial activity exception does not apply, we then look to the noncommercial tort exception. 28 U.S.C. § 1605(a)(5).

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Our analysis begins with the first clause of the commercial activity exception, which the district court concluded controls the immunity claim in this case. If we conclude that plaintiffs based their action on commercial activity of Exportadora in the United States in transporting decedents on the ill-fated flight, there is no immunity.

[2] The FSIA requires two components for this exception to apply: (1) that the foreign entity be engaged in commercial activity, and (2) that that commercial activity have "substantial contact with the United States." 28 U.S.C. § 1603(e); *see Compania Mexicana*, 859 F.2d at 1360 (must be a "significant 'nexus' " between cause of action and commercial activity). A. Commercial Activity

[3] "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d); *see Joseph*, 830 F.2d at 1023; *see generally International Ass'n of Machinists and Aerospace Workers v. OPEC*, 649 F.2d 1354, 1357 n.6 (9th Cir. 1981) (discussing nature and purpose), *cert. denied*, 454 U.S. 1163, 102 S. Ct. 1036, 71 L. Ed. 2d 319 (1982).. The district court concluded that transporting people to and from Exportadora's plant, by its nature, constituted commercial activity.

In our review of that conclusion, we must focus on what is the *nature* of a corporation's transporting people from one place to another. "An activity is public and 'noncommercial' if it is one which only a sovereign state can perform." *Joseph*, 830 F.2d at 1024. But it is commercial if it "is of the type an individual would customarily carry on for profit." *Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656, 86 L. Ed. 2d 273 (1985).

[4] The district court did not clearly err in finding that Exportadora arranged the transportation of the decedents to and from Guerrero Negro and transported them. Arranging transportation and transporting people is not an act that "only a sovereign can perform." Exportadora engaged in commercial activity in arranging transportation for its prospective business partners, Schoenberg, Hernandez and Omachi; bringing them to Guerrero Negro facilitated potential commercial dealings. As for the university representatives, Sugimoto and Kodani, Exportadora arranged transportation for them at the behest of its majority stockholder, the Mexican government. Appeasing one's majority stockholder is an activity that a private entity can perform and benefits future commercial dealings in other contexts by maintaining goodwill. Exportadora has failed to show why such an act is not commercial in nature.

Exportadora's contention that the transportation of Sugimoto and Kodani, the university representatives, was public in nature and therefore sovereign activity is unpersuasive. Exportadora argues that the agricultural experiment site, for which Sugimoto and Kodani were bound, constituted public activity—namely, government-sponsored research. It analogizes to *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980). In that case, two vacationers flew from the United States to the Dominican Republic via Dominicana, the wholly government-owned airline of the destination country. Upon arrival in the Dominican Republic, however, the Arangos were denied entry as "undesirable aliens" and the Dominican government ordered the airline to fly them out of the country. The Arangos sued, claiming damages from the inconvenience of their return-trip odyssey. *Id.* at 1373. The Fifth Circuit held that sovereign immunity applied to Dominicana, because the government "impressed" it into service to carry out a sovereign function, enforcing immigration laws. *Id.* at 1379.

[5] *Arango* is distinguishable. Here, the Mexican government did not order Exportadora to assist it in carrying out a

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sovereign function, as the Dominican government had in *Arango*. Instead, the Mexican government requested that Exportadora make its transportation link available. There was no impressment here. The fact that Sugimoto and Kodani had a public "purpose" at their destination is irrelevant; the inquiry is into the nature of the activity, not its purpose. 28 U.S.C. § 1603(d). The activity was transportation, which Exportadora undertook to appease its majority stockholder. Exportadora's acquiescence in the request helped maintain goodwill with its majority stockholder, which is not an inherently public act. The district court correctly concluded that this transportation was commercial activity. B. Substantial Contact with the United States

[6] "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

Exportadora, defining the relevant activity as the Guerrero Negro-to-Tijuana return air segment, argues that there is no significant nexus with the United States. Plaintiffs, on the other hand, define the activity as round-trip transportation from and to San Diego. Defining the scope of the relevant conduct takes us far in determining the result. *See Machinists and Aerospace Workers*, 649 F.2d at 1357 ("A critical step in characterizing the nature of a given activity is defining exactly what that activity is. The immunity question may be determined by how broadly or narrowly that activity is defined.").

[7] The district court found that Exportadora maintained a regular air-and-auto link between its San Diego and Guerrero Negro offices as part of its commercial operations, that it arranged, through its San Diego office,[2] round-trip transpor-

[2]Exportadora claims that the decision to approve the trip could only have been made at Guerrero Negro and that the San Diego office was merely a conduit for communicating the decision. That contention is immaterial; the San Diego office was involved in arranging the trip, no matter where the decisions were made.

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tation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego. These findings of fact are not clearly erroneous. Given these findings, the district court correctly concluded that the relevant activity was the round trip. The decedents did not make arrangements for legs of the trip separately. They made round-trip arrangements through the San Diego office at the outset, so we consider the arranged travel as a whole.

[8] Thus framed, this case is similar to *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270 (3d Cir. 1980). In that case, involving a tort in Mexico allegedly committed against an American passenger, the Third Circuit held that a government-owned airline was subject to federal court jurisdiction because the passenger bought his ticket in the United States and began his round trip there. Those facts constituted commercial activity in the United States. Similarly, in this case, decedents arranged their round-trip in the United States for departure from and return to the United States. The fact that the transportation was arranged through the San Diego office and the trip began in that city provides a sufficient nexus with the United States. *See id.* at 273; *Barkanic v. General Admin. of Civil Aviation of the Peoples Republic of China*, 822 F.2d 11, 13-14 (2d Cir.), *cert. denied*, 484 U.S. 964, 108 S. Ct. 453, 98 L. Ed. 2d 393 (1987) (travel in China arranged in United States).

Exportadora slices the San Diego-Guerrero Negro journey in segments, arguing that the San Diego-Tijuana leg, and therefore its activity in the United States, ended when its van crossed the border into Mexico en route to the Tijuana airport for the outbound journey to Guerrero Negro. In support, Exportadora relies on *Compania Mexicana de Aviacion, S.A. v. United States Dist. Court*, 859 F.2d 1354 (9th Cir. 1988) (per curiam), which involved an airplane crash of a flight wholly within Mexico. In that case, plaintiffs' decedents traveled on tickets obtained in Mexico for a voyage within Mex-

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ico, but plaintiffs tried to invoke the commercial activities exception because the plane had been serviced in Chicago the day before the accident and the flight was scheduled to terminate eventually in Los Angeles after two stops in Mexico. We rejected the argument, holding that the only relevant act in the United States—the servicing—did not provide a significant nexus with the lawsuit. *Id.* at 1360. In this case, though, the fact that the trip was arranged in the United States to begin in and return to the United States provides the necessary nexus.

[9] Because we hold that the first clause of the commercial activity exception applies, precluding sovereign immunity in this case, we need not address the other two clauses of § 1605(a)(2) or the noncommercial tort exception in § 1605(a)(5).[3]

III

Exportadora also contends that the district court erred in concluding that California law applies to these actions. Jurisdiction to review the district court's choice of law determination rests on 28 U.S.C. 1292(b). The district court's choice of law decision is reviewed de novo. *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1001 (9th Cir. 1987).

[3]Exportadora also claims that its responsibility for the safety of the five travelers ended when its plane was unavailable for the return flight to Tijuana and it instead chartered another aircraft. This contention goes to the merits of plaintiff's tort claims, not to the subject matter jurisdiction question of immunity. Whether Exportadora, having arranged for round-trip transportation to the United States, retained a duty to the travelers to transport them safely, or whether Exportadora is vicariously liable for alleged negligence of the charter pilot, are ultimately questions of tort liability. We express no view as to whether Exportadora ought ultimately to prevail on its tort defenses before the district court. At this point, we consider only the jurisdictional claim and Exportadora's tort arguments are not relevant to that inquiry.

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The choice of law inquiry has two levels. First, we must determine whose choice of law rules govern. Second, applying those rules, we determine whose law applies. On the first level, either California or federal common law choice of law rules control. On the second level, Exportadora claims that Mexican law, which limits damages, should apply, while plaintiffs argue for the application of California law, which does not limit recovery.

A. Whose Choice of Law Rules Apply?

[10] The parties did not dispute before the district court that California's choice of law rules would apply to this action. Their position was incorrect. Although the general rule is "that a federal court sitting in diversity applies the conflict-of-law rules of the state in which it sits," *Harris*, 820 F.2d at 1002 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L. Ed. 1477 (1941)), jurisdiction in this case is based on FSIA, not diversity. *Id.* Therefore, federal common law applies to the choice of law rule determination. *Id.* at 1003; *Liu v. Republic of China*, 892 F.2d 1419, 1425-26 (9th Cir. 1989) (analyzing doctrine of respondeat superior to determine if jurisdictional immunity exception applied), *cert. dismissed*, _ U.S. _, 111 S. Ct. 27, 111 L. Ed. 2d 840 (1990). Federal common law follows the approach of the Restatement (Second) of Conflict of Laws (1969). *Harris*, 820 F.2d at 1003-04.

Exportadora claims that it is too late to contend that the federal common law rule applies because plaintiffs did not so argue before the district court, citing the general rule that a court of appeals does not consider for the first time an issue not raised in the trial court. *See Union Pac. R.R. v. Johnson*, 249 F.2d 674, 677 (9th Cir. 1957). That argument fails, though, because the relevant issue is whose law applies, and Exportadora itself raised that. The question of whose rules apply in *deciding* whose law applies is predicate to the ultimate decision. Because the ultimate *issue*—whose law

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applies—was raised in the district court, this court, in exercising our de novo review on that ultimate issue, must evaluate whatever steps are necessary to decide the issue.

B. Whose Law Applies?

[11] Following the Second Restatement approach, there is "a presumption that the law of the place where the injury occurred applies." *Harris*, 820 F.2d at 1003-04. The relevant Restatement section provides:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 175 (1969) (quoted in *Harris*, 820 F.2d at 1004 n.3). In this case, the injuries occurred in California, where the plane crash occurred. Under the Second Restatement approach, California law should apply unless Mexico has "a more significant relationship . . . to the occurrence and the parties." *Id.*

[12] Factors to consider in the "more significant relationship" test include:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

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(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Id. at § 6(2) (quoted in *Harris*, 820 F.2d at 1004 n.4).[4] Applying these factors, we conclude that Mexico does not have a more significant relationship to this suit than California, the place of injury. Mexico's policy is to limit the liability of its resident defendants in wrongful death actions. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 583, 522 P.2d 666, 671, 114 Cal. Rptr. 106, 111 (1974). California's rule allowing full recovery serves two policies: (1) providing full compensation for the survivors of its residents, *id.* at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112, and (2) deterring wrongful conduct within its borders, "said interest extending to *all* persons present within its borders." *Id.* (emphasis added).[5] Given those competing policies, we cannot say that Mexico has a more significant relationship to this litigation. Applying California law in this case "furthers the choice-of-law values of certainty, predictability and uniformity of result and . . . ease in the determination and application of the applicable law." Restatement (Second) of Conflict of Laws § 175 comment d;

[4]This list is not exclusive. Restatement (Second) of Conflict of Laws § 6 comment c.

[5]"It is also abundantly clear that a cause of action for wrongful death without any limitation as to the amount of recoverable damages strengthens the deterrent aspect of the civil sanction: 'the sting of unlimited recovery . . . more effectively penalize[s] the culpable defendant and deter[s] it and others similarly situated from such future conduct.' " *Hurtado*, 11 Cal. 3d at 584, 522 P.2d at 672, 114 Cal. Rptr. at 112 (quoting Seidelson, *The Wrongful Death Action*, 10 Duq. L. Rev. 525, 528 n.12 (1972)).

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see Harris, 820 F.2d at 1004 (applying law of place of injury, under Second Restatement analysis, in suit arising out of airplane crash).[6] The district court's determination that California law applies is affirmed.

IV

The district court correctly determined that sovereign immunity does not apply to the defendants in this case. Although it followed the wrong path in deciding the choice of law issue, it correctly concluded that California law applies.

AFFIRMED.

[6]This case is not one of "those relatively rare situations where, with respect to the particular issue, the state of injury bears little relation to the occurrence and the parties." Restatement (Second) of Conflict of Laws § 175 comment d. California's interests and policies in protecting the safety of its airspace and in providing full compensation to its residents are implicated.

APPENDIX E

Statutory Provision Involved -
Relevant Excerpts From The Foreign
Sovereign Immunities Act

STATUTORY PROVISION INVOLVED

The instant petition raises important issues regarding the application of the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. § 1602 et seq.), and the interpretation of a statutory exception to the immunities created by that Act. EXPORTADORA DE SAL, S.A. DE C.V. ("EXPORTADORA") is a Mexican corporation, owned in majority part by the Government of the United States of Mexico. Consequently, EXPORTADORA is a "foreign state" for the purposes of the FSIA.

> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity -
>
> ...
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof ...

28 U.S.C. § 1603.

Because EXPORTADORA is a "foreign state" for the purposes of the FSIA, it is presumptively immune from the jurisdiction of the United States courts.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the

United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604.

However, jurisdiction was found to exist over EXPORTADORA in this case under the first clause of the "commercial activities" exception to the FSIA.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

...

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state...

28 U.S.C. § 1605.

"Commercial activity" is defined by the FSIA as follows:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1603.

Supreme Court, U.S.
FILED
OCT 31 1994
CLERK

No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED.

1. Whether there is jurisdiction under the Foreign Sovereign Immunities Act where decedents were killed in the United States, giving rise to a wrongful death case against a business corporation, majority-owned by a foreign state, where:

(a) defendant assumed a duty in the United States to transport the decedents non-negligently,

(b) defendant arranged decedents' round-trip transportation through defendant's office in the United States,

(c) defendant agreed to transport the decedents as the carrier from the United States to Mexico and back,

(d) defendant began the trip by transporting the decedents as the carrier from the United States,

(e) defendant delegated the return flight from defendant's company town to a substitute for the company airplane, the substitute acting as a contract carrier,

(f) the pilot, engaged by the defendant on a scheduled flight on the corporate transportation link, transported decedents in the United States on behalf of the corporation, and

(g) negligent piloting in United States airspace caused the airplane to crash in the United States killing all on board, as part of the return trip to the United States?

2. Is there jurisdiction under the Foreign Sovereign Immunities Act, implied waiver exception, where the defendant waives sovereign immunity in opening statement and stipulates to jurisdiction at trial?

Parties to the Proceeding

Petitioner is Exportadora De Sal, S.A. De C.V. ("Exportadora"), a Mexican corporation, majority owned by the United Mexican States, a foreign state.

Respondents are Hiroko Sugimoto, Kimiko Kodani, Mayumi Nukiwa, and Kuniko Omachi, individually and as Guardian Ad Litem on behalf of Eri Omachi, a minor.

Mitsukuni Sugimoto, Yasunobu Sugimoto, and Kyoko Kodani are no longer parties to the case.

Exportadora's statement does not accurately state the parties to the case.

Rule 29.1 Listing

Exportadora is forty nine percent owned by Mitsubishi Corporation ("Mitsubishi"), the parent company of the Mitsubishi group, which issues shares to the public traded on the Tokyo, London and Paris stock exchanges.

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No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINIONS AND DECISIONS BELOW

The opinion of the court of appeals that petitioner seeks to have reviewed is Sugimoto v. Exportadora De Sal, S.A. De C.V., 19 F.3d 1309 (9th Cir. 1994). (A 110) [1] The findings and conclusions of Senior District Judge James M.

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[1] The appendix is cited by page and finding number. Respondents' Appendix begins at page 106, after Exportadora's 105 pages.

Fitzgerald at trial were a memorandum decision of March 9, 1993. (A 12-76) An order amending judgment was filed May 7, 1993. (A 117) [2] Final judgment was entered in district court on May 11, 1993. (A 147) [3]

Memorandum decisions were entered denying Exportadora's motion to dismiss for sovereign immunity on June 29, 1989 (A 121)[4], and determining that California law is applicable on August 31, 1989. (A 131)[5] Exportadora's interlocutory appeal on sovereign immunity and choice of law is Schoenberg v. Exportadora De Sal, S.A. De C.V., 930 F.2d 777 (9th Cir. 1991). (A 88)

JURISDICTION

Exportadora seeks certiorari. 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611, excerpted in the Appendix. (A 106)

STATEMENT OF THE CASE

A. FACTS.

The petition speaks as if the decedents had nothing

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[2] Required by Rule 14.1(k)(i) and omitted by Exportadora from the Appendix.

[3] Required by Rule 14.1(k)(iv) and omitted by Exportadora from the Appendix.

[4] Required by Rule 14.1(k)(ii) and omitted by Exportadora from the Appendix.

[5] Required by Rule 14.1(k)(ii) and omitted by Exportadora from the Appendix.

to do with the United States and nothing to do with Exportadora. To the contrary, *decedents were Exportadora's passengers and business visitors, killed in San Diego, California* on September 30, 1987 by Exportadora's negligent commercial activity.

The case is based on transactions and events that occurred in the United States. Exportadora is a salt manufacturer with an office in San Diego, California. *The travel arrangements for decedents were made through Exportadora's San Diego office.* Schoenberg at 781. (A 97) The round trip began and ended in San Diego. *The negligence occurred here. The non-delegable duty was assumed by the defendant in the United States.* The decedents were accepted as defendant's passengers for carriage through defendant's San Diego office. *The decedents were killed in the United States* while Exportadora was transporting them, through its agent under a non-delegable duty, *on a trip to the United States.*

Exportadora agreed to transport the passengers, as the carrier for a round trip, between San Diego and Guerrero Negro. (A 47-48 F 97-98; A 51 F 103; A 62 F 122; A 65 F 126; A 48 F 100; A 236.) Exportadora's assertion that it only "agreed to arrange for transportation to Guerrero Negro and back" is contrary to the findings. Exportadora transported the passengers round trip from San Diego. (A 46 F 97-A 47 F 98; A 52 F 104-105)

The district court found that the *transportation of the passengers from Guerrero Negro to Tijuana was on behalf of Exportadora.* (A 31, F 49)

The Ninth Circuit in Sugimoto affirmed the district court's factual finding that Exportadora was engaged in commercial activity in the United States when the air taxi flew in United States air space. *The charter flight was acting for Exportadora in transporting the passengers.* (A 31 F 49; A 232-233, 239)

In Sugimoto, the Ninth Circuit correctly affirmed that "Exportadora controlled the transportation offered to

business visitors to its [Guerrero Negro] plant and company town . . . arranged for their transportation, paid all the expenses, fed them, determined where they would stay and how they would come and how they would go." (A 8)

The passengers were scheduled to travel round trip on the company airplane. (A 52 F 104; A 228) Exportadora chartered the air taxi as a substitute for the company airplane. (A 52 F 104; A 227) The carrier-passenger relationship between Exportadora and the decedents continued to the time of the accident. (A 48 F 98; A 55 F 110; A 24 F 33)

There were no tickets for the flight. (A 213 ¶ 32)

Exportadora's assertion that all decisions regarding the travel arrangements were made in Mexico and Japan is contrary to the record. There is no evidence of any decision in Japan. The district court found that Exportadora made all the arrangements (A 22 F 22), and that the passengers had nothing to do with any arrangements for their travel and accommodations. (A 22 F 22; A 55 F 110)

The agreement to transport the passengers was made through the San Diego office. (A 15 F 6; A 211 ¶ 18; A 231; A 225, 227-228, 230-231) Exportadora's San Diego office put the passengers on the list to travel. (A 231) *Exportadora's employees or representatives in San Diego accepted the decedents in the United States as Exportadora's passengers, when their trip to Mexico began.* (A 19 F 14; A 20 F 16)

Exportadora is one of the world's largest commercial salt producers, 51% owned by the United Mexican States ("Mexico") and 49% by Mitsubishi Corporation ("Mitsubishi"). (A 208) Exportadora's remote company town is located on the desert at Guerrero Negro, Mexico. Exportadora's San Diego office communicated with parties outside Mexico on behalf of the Exportadora salt plant in Guerrero Negro. Sugimoto at 1310. (A 5, 14, 92, 123, 188)

"The district court found that *Exportadora maintained a regular air-and-auto link between its San Diego*

and Guerrero Negro offices as part of its commercial operations, that it arranged, through its San Diego office, round-trip transportation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego." Schoenberg at 781. (A 97-98; A 15 F 6; A 47 F 97; A 123-124)

Two Americans were killed in the accident, on September 30, 1987. (A 158; A 93; Schoenberg at 779) [6] The other three passengers were Japanese, and their widows and orphan are respondents. Mr. Omachi was a purchasing agent for Asahi Chemical Industry Co., Ltd. ("Asahi") a substantial customer for Exportadora's salt. (A 210-211) Dr. Sugimoto and Dr. Kodani were professors at Tottori University. The university was conducting an agricultural project, growing vegetables in the desert, at Guerrero Negro. (Schoenberg at 779; A 93; Sugimoto at 1310; A 6, A 16 F 8, A 18 F 12, A 209 ¶ 12 - 210, 243)

Exportadora received consideration in exchange for its transportation of each passenger. (A 22 F 24) *Exportadora benefited commercially from transporting each passenger.* (A 22 F 24; A 61 F 120) The district court found that "Exportadora enjoyed the primary benefit of the transportation of the decedents." (A 61 F 120) Exportadora's statement that it did not profit, or receive anything of value, for the transportation is false.

The district court did not hold that Exportadora had no control of the flight after it left Guerrero Negro, as Exportadora misstates. The district court found that the pilot controlled only the decision of whether to undertake the flight, how the flight would be conducted, and whether under the restricted conditions a landing at Tijuana airport should be attempted. (A 60 F 119)

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[6] The two decisions at the outset of the case (A 121-130, 131-146), affirmed by the Ninth Circuit in Schoenberg, contain the findings required by the FSIA to determine lack of immunity at the outset of the case.

The district court found that Exportadora scheduled the flight (A 60 F 119; A 30 F 49), arranged the flight to transport decedents as Exportadora's passengers (A 65 F 126), scheduled the departure to accommodate a customer (A 30 F 49; A 31 F 51), scheduled the arrival at Tijuana by 8:00 a.m. (A 30 F 47), and told the pilot to pick up two Exportadora employees in Tijuana to return to Guerrero Negro. (A 24 F 33; A 208 ¶ 2) In other words, Exportadora controlled the flight schedule, the list of passengers, the destination, the time of departure, and the time of arrival.

Exportadora's assertion that the pilot was neither expected nor authorized to attempt a landing at Tijuana through United States air space is contrary to the findings, contrary to all of the evidence, and false.

Exportadora intended the flight to use United States air space for an instrument landing. An instrument flight rules ("IFR") flight plan was filed before departure. (A 32 F 53) Obviously, IFR visibility conditions, and use of the instrument landing system ("ILS"), were foreseeable to the pilot and to Exportadora, where an IFR flight plan was filed. It is stipulated that Tijuana Airport uses United States airspace for the ILS. (A 213 ¶ 40)

Exportadora told the pilot to go to Tijuana (A 208 ¶ 2, 212 ¶ 30, 213 ¶ 35, 237). Any instrument flight using the Tijuana ILS would certainly be in the United States. *Rather than being unexpected and unauthorized, the use of United States air space was virtually certain*, entirely foreseeable under the IFR weather forecast, and an implied part of Exportadora's instructions to go to Tijuana.

The ILS approach to Tijuana Airport does not "briefly traverse" or "swing over" the United States as Exportadora misstates. The ILS extends for miles in a straight line into the United States. (A 155) *The pilot flew 9 or 10 miles in United States air space prior to the crash.* (A 272-273) Every use of the ILS is certain to involve substantial contact with the United States.

Exportadora's denial of the weather forecast is false.

The forecast for San Diego, where the ILS is located, was for ceilings of 200 feet, visibility of one half mile in fog until 11:00 a.m., a forecast of below minimum visibility for an instrument landing. (A 154, 246-247) The forecast for Tijuana was for temporary ceilings of 1,000 feet and visibility of 2 miles in fog until 8:00 a.m., an instrument flight rules ("IFR") forecast. (A 150, 249-250) The accident occurred in San Diego at 7:56 a.m. (A 41 F 81) in forecasted San Diego weather conditions of less than minimum visibility. *The flight, following a schedule under Exportadora's control, arrived in less than minimum weather conditions for a landing attempt. These conditions were foreseeable before departure.* [7]

The district court found in 1989 that "[i]t was entirely foreseeable to Exportadora that passengers could be injured in the United States on a trip to the United States." (A 145 n. 2; Emphasis in the text.)

Exportadora's petition is false in asserting that Exportadora "specifically requested the pilot to fly on to another airport . . . if he encountered poor weather in Tijuana." (Petition at 18) Exportadora actually told the pilot "if conditions were not good there in Tijuana, that *he [the pilot] could go to Mexicali.*" (A 30 F 47; A 237) No instruction was given. *The pilot could go as an option.*

The air controller did not instruct the pilot, nor encourage the pilot, to make an attempt to land, as Exportadora misstates.[8] The pilot, knowing airport operations were restricted with fog, decided to make an ILS landing attempt. (A 28-29, 40 F 78, 41 F 79, 213 ¶ 38)

The accident was caused by the pilot's negligence in

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[7] Plaintiffs' expert meteorologist (A 249-250) and expert pilots (A 265-266, 274-278) testified that IFR conditions and fog were foreseeable.

[8] Exportadora's misstatements and false statements are so numerous that it would be impossible to correct all of them within the page limits. The Court should not believe any statement from Exportadora.

United States air space in failing to follow the ILS glide path and failing to execute a missed approach at decision height. (A 43 F 86; 45 F 93; 263, 266, 268, 269, 272, 273) The pilot was incompetent to conduct an IFR approach, as the experts testified. (A 265, 274, 278-280) *The airplane collided with a hill in the United States* at a high rate of speed with power applied to both propellers. (A 43-44; 173, 252, 258, 259) At the time, visibility was less than the minimum required for an instrument landing. (A 214 ¶ 45)

Exportadora did not contract with a commuter airline, licensed to provide airline services, for the flight, as the petition misstates. (Petition at 5 ¶ 1) Aviones[9] is an air taxi operator (A 6 ¶ 3; A 25 F 34) not a commuter airline. Exportadora's statements to the contrary are false and vexatious.[10]

Exportadora transported Dr. Sugimoto and Dr. Kodani at the request of Mitsubishi, an Exportadora shareholder. (A 61 F 120) Exportadora gained valuable consideration for transporting the scientists, including stockholder goodwill (A 66 F 128) and future commercial dealings in other contexts. (A 22 F 24)

The government of Mexico encouraged Exportadora "to assist the Japanese [with the agricultural project] as a courtesy to its co-stockholder in Exportadora and Tottori University." (A 176, 233, 243; A 127, 96-97, 7) *Exportadora accepted the request to maintain goodwill with its shareholder, which is not an inherently public act*, as the Ninth Circuit held in Schoenberg. (A 96-97, 236)

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[9] Exportadora's assertion about Aviones' reputation is not in the record. Reputation evidence was excluded. (RT XV 14:6-12; RT XVI 26:4-27:7)

[10] Exportadora argues evidence of Aviones' insurance, admitted for a limited purpose, for an unlimited purpose on liability. (Petition at 25 n.3) Respondents object and move to strike references to insurance of $ 13,329 per passenger (A 86 F 185), under Rule 411, Fed.R.Evid.

Mr. Bremer, Exportadora's President, testified at trial that *the government of Mexico did not order Exportadora to assist the agricultural project* (A 234), "there were no orders given". (A 235) Assisting the agricultural project provided Exportadora with stockholder goodwill from Mitsubishi. (A 236)

Exportadora transported the scientists to appease its majority stockholder, an activity that a private entity can perform. (A 96, 243-244) As the Ninth Circuit affirmed in Schoenberg "the Mexican government did not order Exportadora to assist it in carrying out a sovereign function". (A 96-97) The evidence at trial agreed with that finding. (A 233-235)

The agricultural project was not conducted with the cooperation of the governments of Mexico and Japan, as Exportadora misstates. (Petition at 4 ¶ 1) There is nothing in the record about the government of Japan in 1987, the year of the accident. Mr. Bremer testified that in 1988, *after the accident*, an agreement was signed between those governments for research. (A 233-235) *During 1987, at the time of the accident, the agricultural project was being conducted by Tottori University, at the invitation of Mitsubishi* (A 176, 184-185, 233-234, 235), on Exportadora's land (A 176 ¶ 4) not the government's land.

Dr. Sugimoto and Dr. Kodani were not transported at the direction of the government of Mexico pursuant to an agreement between the governments of Mexico and Japan, as Exportadora misstates. (Petition at 4 ¶ 2) There is nothing in the record about the government of Japan in 1987. The district court found in 1989 that the Mexican government requested that Exportadora transport the professors. (A 124, 127)

The wreckage of the airplane was stolen from the site of the accident in the United States. (A 33-34, 257-258)

B. PROCEEDINGS BELOW AND JURISDICTION IN THE DISTRICT COURT.

The Ninth Circuit entered judgment March 25, 1994, denied Exportadora's petition for rehearing and suggestion for rehearing en banc on August 2, 1994, and denied Exportadora's motion for stay of mandate on August 12, 1994. The mandate issued on August 15, 1994.

Exportadora's application to the Supreme Court for a stay of enforcement of judgment, No. A 94-131, was denied by Justice O'Conner on August 23, 1994.

Jurisdiction in the district court was held to rest on 28 U.S.C. §§ 1330, 1605(a)2[1], the first clause of the commercial activities exception of the Foreign Sovereign Immunities Act ("FSIA") in four decisions. Exportadora is a business corporation, majority-owned by a foreign state.

Exportadora's motion to dismiss for sovereign immunity was denied on June 29, 1989. (A 121-130) The district court made factual findings, as required under Rule 12(b)(1), Fed.R.Civ.P., to resolve the question of sovereign immunity at the outset of the case. Moran v. Kingdom of Saudi Arabia, 27 F.3d 169, 172 (5th Cir. 1994). The district court must resolve factual disputes on a Rule 12(b)(1) FSIA motion. Land v. Dollar, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 1011 n. 4, 91 L.Ed. 1209 (1947); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988). Exportadora's assertion is false that the sovereign immunity issue was not resolved at the beginning of the case. The cases were consolidated after that decision (A 192), and that decision is part of the record in these cases.

Jurisdiction in the district court also rests on three other exceptions that the district court and Court of Appeals did not have to reach, the second and third clauses of the commercial activities exception and the implied waiver exception. All three clauses of the commercial activities exception were alleged in the complaint (A 197-200). The pretrial order invokes the first and third clauses. (A 207-208), both of which were argued at trial and in both appeals. Exportadora's statements to the contrary are false.

All three clauses, and the implied waiver exception, were argued to the Ninth Circuit in Sugimoto.

The district court determined on August 31, 1989, that California law applies under choice of law principals (A 142-146), and that the accident in California was foreseeable to Exportadora. (A 144-145)

On interlocutory appeal the Ninth Circuit affirmed. Schoenberg v. Exportadora De Sal, S.A. De C.V., 930 F.2d 777 (9th Cir. 1991). Exportadora settled with the Schoenberg and Hernandez families and stipulated dismissals were entered in those cases on May 15, 1992. [11]

Trial began January 11, 1993.

Exportadora's assertion that it was "denied the opportunity of contesting jurisdiction at trial" is false. Exportadora waived sovereign immunity in opening statement, then stipulated to in personam jurisdiction and subject matter jurisdiction for the stated purpose of saving time. (A 220) After the waiver and stipulation, the district court found at trial that there was jurisdiction. (A 220)

Plaintiffs presented evidence on jurisdiction. Exportadora presented no evidence of lack of jurisdiction and never argued sovereign immunity at trial.

The Ninth Circuit requested a letter brief on whether there is jurisdiction after Saudi Arabia v. Nelson, 507 U.S. - - , 123 L.Ed.2d 47, 113 S.Ct. 1471 (1993). Respondents filed a motion in the Ninth Circuit to amend the jurisdictional allegations of the complaint under 28 U.S.C. § 1653 to allege implied waiver.

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[11] A new consolidation order was entered June 5, 1992, providing that the record in the consolidated cases under the previous low number case, Schoenberg, is part of the record in the present cases, and consolidating the present cases. The record in the cases consolidated under case no. 88-1532, Sugimoto, consists of more than 500 docket entries, and under Schoenberg, 580 docket entries. The cases have the longest docket in the history of the Southern District of California. The record in Schoenberg includes the original sovereign immunity decisions.

The Ninth Circuit held that subject matter jurisdiction exists because the case is based on Exportadora's commercial activity in the United States. Exportadora's transportation of the passengers on the fatal flight was found to be Exportadora's commercial activity in the United States which included negligent piloting, an element of plaintiffs' claim. Sugimoto, at 1311.

On July 1, 1994 the Ninth Circuit amended its opinion. (A 10) Exportadora misstates that the Ninth Circuit did not rule on the merits of any liability theory. The Ninth Circuit affirmed by implication that Exportadora had a non-delegable duty to transport the passengers non-negligently, citing the case of Van Arsdale v. Hollinger, 68 Cal.2d 245, 253, 66 Cal.Rptr. 20, 25, 437 P.2d 508, 513 (1968), Sugimoto at 1312, a case relied on by the district court in concluding a non-delegable duty applies. (A 60-61)

The Ninth Circuit did not have to reach the other liability theories of non-delegable contractual duty and ostensible agency relied on by the district court.

Personal jurisdiction exists by stipulation. [12] Service of process was accepted by stipulation. Personal jurisdiction was stipulated to at trial. (A 219-220, 222) Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 72 L.Ed.2d 492, 102 S.Ct. 2099, 2104-2105 (1982).

SUMMARY OF ARGUMENT

The case is based on acts and events that occurred in the United States. The opinion correctly applies Saudi Arabia v. Nelson, 503 U.S. - - , 123 L.Ed.2d 47, 59, 113

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[12] The parties in Republic of Argentina v. Weltover, 504 U.S. - - , 119 L.Ed.2d 394, 402, 408, 112 S.Ct. 2160 (1992) were all citizens of foreign states. Jurisdiction under the FSIA arises under federal law. The FSIA authorizes a foreign plaintiff to sue a foreign state in a federal court on a non-federal claim. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492-493, 76 L.Ed.2d 81, 89, 91-92, 103 S.Ct. 1962 (1983).

S.Ct. 1471, 1477 (1993). Defendant assumed a non-delegable duty in the United States. Decedents were killed in the United States. All of the elements of negligence occurred in the United States. Defendant made decedents' travel arrangements through defendant's office in the United States. The round trip began and ended in the United States. The accident in the United States was foreseeable on a trip to the United States. The pilot was authorized by defendant to carry defendant's passengers and to attempt a landing through United States air space.

In arguing that jurisdiction should not be defined by the elements of the state law claim (Petition at 21), Exportadora is arguing in effect that the holding in Saudi Arabia was incorrect. To the contrary, defining jurisdiction by the elements of the claim is a clear, uniform rule. Saudi Arabia was correct and should not be reconsidered.

The circuits agree that a principal's commercial activity, carried on through an agent in the United States, is the principal's commercial activity as to jurisdiction over the principal. The issue in this case is not the same as an issue of separate corporate existence. There is no conflict between the circuits.

One decedent was the purchasing manager of a major customer of Exportadora. The two decedent scientists were transported at the request of an Exportadora shareholder. Exportadora received consideration and commercial benefit from transporting each passenger.

Exportadora argues that its activity was not commercial because the "for profit" test should define commercial activity (Petition at 22 n.2), and it denies making a profit on the transaction. Exportadora is arguing in effect that the Court's holding in Republic of Argentina v. Weltover, 504 U.S. - -, 119 L.Ed.2d 394, 405, 112 S.Ct. 2160 (1992) was incorrect. Weltover rejected the "for profit" test in favor of the test of whether the activity is the type of action by which a private party engages in trade, traffic or commerce.

Transporting passengers, arranging transportation, and extending a courtesy to a shareholder, are the type of actions by which a private party engages in commerce. Exportadora's activity was commercial. Weltover was correct and should not be reconsidered.

Exportadora waived sovereign immunity at trial, and its statements to the contrary are false.

Exportadora's petition argues in effect against the Court's holdings in recent controlling cases. The petition misstates the facts and law, misstates the findings and holdings of the Ninth Circuit and district court in the cases below. The opinion of the Ninth Circuit correctly applies the Court's controlling cases. Certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT WITH SUPREME COURT DECISIONS.

A. Exportadora's Contentions.

Exportadora contends that the case conflicts with Saudi Arabia because plaintiffs' claims are not based on commercial activity of Exportadora which had substantial contact with the United States, the flight was not commercial activity of Exportadora, and the crash in the United States was unexpected and unauthorized.

Exportadora contends its activity was not commercial because it did not profit from the transaction.

Exportadora contends that there is conflict with another circuit, where the activities of a corporate subsidiary were not attributed to the parent company based only on ownership, contending that attributing the pilot's negligence under a non-delegable duty is the same as attributing a subsidiary's activities to a parent company only because of ownership.

Exportadora contends that defining jurisdiction by

the elements of the state law claim is at odds with a uniform body of law. Exportadora contends lack of sovereign immunity was not determined at the outset, denying it due process.

Exportadora's contentions are contrary to the record, misdescribe the legal issues, and are contrary to Saudi Arabia which determines jurisdiction under the commercial activities exception of the FSIA based on the elements of the state law claim, a clear uniform rule. Exportadora's contentions are also contrary to the holding in Weltover which rejects the profit motive test of commercial activity.

B. Saudi Arabia is Correctly Applied.

1. The Case is Based on Commercial Activity Carried on by Exportadora Having Substantial Contact with the United States.

The decision correctly applies Saudi Arabia v. Nelson, 503 U.S. - - , 123 L.Ed.2d 47, 59, 113 S.Ct. 1471, 1477 (1993) to the facts. Saudi Arabia applied the first clause of the commercial activities exception, applicable where the case is "based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. § 1605(a)(2)[1]. Such activity is "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e). This definition includes commercial transactions, such as a business flight, performed in whole or in part in the United States. Weltover, 119 L.Ed.2d 394 at 408; H.R.Rep. No. 1487, 94th Cong., 2nd Sess. 16, *reprinted in* 1976 U.S. Cong. & Admin. News 6604, 6615.

In Saudi Arabia the Supreme Court identified the conduct on which an action is "based" as meaning the "elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case . . . ." Saudi Arabia, 123 L.Ed.2d 47, 59 (1993). If one element of a claim is

based upon the defendant's commercial activity in the United States there is jurisdiction. Santos v. Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991).

Exportadora assumed the element of a duty of care when it accepted decedents as Exportadora's passengers in San Diego, California at the outset of the round trip. Brown v. Feather River Lumber Co., 203 Cal. 493, 497-498 (1928). (A 19 F 14, A 20 F 16, A 46 F 97, A 52 F 104, A 65 F 126) Decedents were killed in the United States (A 14 F 4), when the duty was breached in the United States by the pilot's negligence. (A 7; 45 F 93) Sugimoto at 1311.

Defendant made the travel arrangements through the defendant's office in the United States. Schoenberg at 781. (A 97; A 22 F 22; A 211 ¶ 18; A 231, 225, 227-228, 230-231) Defendant agreed to transport the decedents as the carrier from San Diego to Guerrero Negro and back to the United States. (A 47 F 98; A 52 F 104) The trip began in the United States with defendant transporting decedents, and assuming the duty here. (A 19 F 14, A 20 F 16)

The airplane crashed in the United States on the return trip to the United States. Schoenberg at 781-782; Sugimoto at 1310-1312. The pilot was transporting the passengers in the United States on behalf of Exportadora (A 31 F 49, A 47 F 98, A 51 F 103 - A 52 F 104), on a flight on the company's transportation link. (A 15 F 6) (A

The transportation agreement provided that if decedents traveled to San Diego, Exportadora would transport them to Guerrero Negro and back. The last act done to give the agreement binding effect was Exportadora's acceptance of decedents as passengers in San Diego. The contract was made in California "where the last act is done which is necessary to give a contract binding effect." 1 Witkin, Summary of California Law, 9th Ed. 1987, Contracts, § 47, p. 86; Michelin Tire Co. v. Coleman Co., 179 Cal. 598, 604 (1919).

Undertaking a duty in the United States to transport passengers safely, transporting passengers negligently in

United States air space, crashing into the United States, and causing wrongful death in commercial activity in the United States, is carrying on commercial activities having substantial contact with the United States. Sugimoto at 1311; 28 U.S.C § 1603(e). People were killed by Exportadora's negligent commercial activity in the United States.

Making travel arrangements, or an agreement for transportation, from and to the United States, through an office in the United States is substantial contact with the United States for jurisdiction. Santos at 894.

2. The Pilot was Exportadora's Agent Under a Non-delegable duty.

Undertaking a non-delegable duty was a commercial act by Exportadora in the United States, as were the elements of negligent breach, and death caused by the breach. These elements are sufficient to satisfy 28 U.S.C. § 1605(a)(2)[1] under the holding in Saudi Arabia. The non-delegable duty was assumed in the United States when Exportadora accepted the passengers in San Diego and began to transport them. *All the elements of negligence by the pilot, Exportadora's agent under the non-delegable duty, occurred in the United States.*

Under California law, an independent contractor is the agent of the principal when the principal has a non-delegable duty. The principal is ". . . *liable for the negligence of his agent, whether his agent was an employee or an independent contractor.*" Maloney v. Rath, 69 Cal.2d 442, 446 (1968). [Emphasis added.]

A company may be both an agent and an independent contractor under California law. City of Los Angeles v. Meyers Bros. Parking System, Inc., 54 Cal.App.3d 135, 138, 126 Cal.Rptr. 545 (1975); Mottola v. R.L. Kautz Co., 199 Cal.App.3d 98, 108, 244 Cal.Rptr. 737 (1988). There is no inconsistency in the charter company

having both capacities under a non-delegable duty. [13]

Non-delegable duty was alleged in the complaint (A 198 ¶ 13) and was specified in the pretrial order. (CT 209, 1-7-93, p. 22:4-11) Exportadora's statement that only negligence was alleged is false.

The trial court found a non-delegable tort duty based on public policy grounds. (A 56-57, 60-62) Van Arsdale v. Hollinger, 68 Cal.2d 245, 253 (1968); Alaska Airlines v. Sweat, 568 F.2d 916 (Alaska 1977).

The Ninth Circuit affirmed by implication the conclusion that Exportadora had a non-delegable tort duty on public policy grounds, citing one of the cases relied on by the district court, Van Arsdale. Sugimoto at 1312. (A 11; A 60-61; A 55-56; A 116)

Even if, for the sake of argument, Exportadora's contention were accepted that the Ninth Circuit affirmed an exception to the general rule of nonliability for the torts of an independent contractor, some of the reasons relied upon - in addition to the pilot's negligence - occurred through defendant's office in the United States, including Exportadora's control of transportation offered to business visitors, approval of business visitors, arranging for transportation, and determining how business visitors would come, and how they would go. (A 116) These reasons are Exportadora's commercial activities having substantial contact with the United States.

3. The Accident was Foreseeable in the United States. The Pilot was Authorized to be in the United States.

Exportadora's commercial activity had substantial contact with the United States, consistent with Saudi

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[13] There is also no inconsistency in Aviones being an ostensible agent and an independent contractor. (A 65 F 126)

Arabia, because the accident in the United States was foreseeable to Exportadora on a trip to the United States (A 129; A 145 n.2; A 213 ¶), not fortuitous as Exportadora misstates. The flight was intended, expected and authorized by Exportadora to enter the United States, as would any flight under the forecast for fog. Exportadora in fact instructed the pilot to land at Tijuana, and never instructed him to go to another airport. (A 237; A 30 F 47) Exportadora's statements to the contrary are false.

In a nearly identical case, where Americans were killed in the United States in the crash of a Mexican-owned airplane on approach in fog to Tijuana airport, the district court found that the "pilots intentionally entered United States air space with the approval of Tijuana air control to make an instrument landing . . . the flight over California was neither accidental nor fortuitous." Olsen by Sheldon v. Government of Mexico, 729 F.2d 641, 649 (9th Cir. 1984), *cert. denied sub nom.*, 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984).

Olsen holds that negligent piloting in the United States, which causes wrongful death here, is sufficient for FSIA jurisdiction. Olsen at 646.

Scope of employment under the FSIA is determined by state law. Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1025 (9th Cir. 1987). Under California respondeat superior doctrine, whether an employee has committed a tort in the scope of employment is a question of whether: (1) the act was either required or incident to his duties, or (2) the employee's misconduct could reasonably be foreseen by the employer. Id. "Foreseeability" in this context "merely means that in the context of the particular enterprise an employee's conduct is not so usual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business." Id.;Mary M. v. City of Los Angeles, 56 Cal.3d 202, 209, 285 Cal.Rptr. 99, 814 P.2d 1341 (1991).

Exportadora contends that the pilot was not authorized to enter United States air space, and asserts that Exportadora requested that the pilot go to Mexicali if he encountered poor weather in Tijuana. (Petition at 18)

Exportadora misstates the facts. In fact, the pilot was told he could go to an alternate as an option. (A 237; A 30 F 47) Exportadora scheduled the flight to arrive at Tijuana at about 8:00 a.m. (A 212 ¶ 30) *In attempting to land in United States air space at 7:56 a.m. (A 41 F 81), the pilot was following Exportadora's instructions and flight schedule.*

The pilot's act was certainly within the scope of his employment and foreseeable. It would not be unfair to include the loss resulting from the pilot's tort among the other costs of the employer's business. The Ninth Circuit affirmed that the insurance to distribute the risk is properly a cost of Exportadora's business. Sugimoto at 1312. (A 116) This conclusion was amply supported by the evidence that the flight was an Exportadora business flight. The issues affirmed were specified in the pretrial order (CT 209, 1-7-93, p. 27:3-13) and were litigated. Exportadora's statement to the contrary is false.

The district court's implied finding that the pilot acted within the scope of his employment was not error.

An agent has implied or incidental authority to proceed in a reasonable manner, even under unexpected conditions. 2 Witkin, Summary of California Law, 9th Ed. (1987), § 79, p. 82. Fog was not unexpected. The pilot believed an ILS landing could be attempted. (A 36 F 69-72)

The pilot had implied authority to use the Tijuana ILS in the United States. *The pilot filed an instrument flight rules flight plan before departure.* (A 32 F 53) The ILS extends for miles into the United States. (A 155-156; A 269; A 272-273) *The flight was virtually certain to use United States air space, as would any ILS instrument flight.*

An agent has authority to do "everything necessary or proper and usual" to effect the purpose of his agency. Cal.Civ.Code § 2319. The scope of the agent's authority is a

question of fact. Mary M. v. City of Los Angeles, 56 Cal.3d 202, 213, 285 Cal.Rptr. 99, 814 P.2d 1341 (1991). The scope of authority may be established by circumstantial evidence.Boise Payette Lumber Co. v. Larsen, 214 F.2d 373, 376 (9th Cir. 1954); Ripani v. Liberty Loan Corp., 95 Cal.App.3d 603, 611, 157 Cal.Rptr. 272 (1979); Vargas v. Ruggiero, 197 Cal.App.2d 709, 716, 17 Cal.Rptr. 768 (1961).

Exportadora never argued, neither at trial nor in the Court of Appeals, that the pilot was unauthorized to enter United States air space. The Court should not consider an argument on a factual issue that is presented for the first time in the Supreme Court. Whittaker Corp. v. Execuair Corp., 953 F.2d 510, 515 (9th Cir. 1992).

Exportadora's argument that jurisdiction should not be defined by the elements of the state law claim (Petition at 21) is an argument that the opinion in Saudi Arabia was incorrect. Saudi Arabia defines jurisdiction by the elements of the theory of the case, a clear, uniform rule that the Court should not reconsider.

4. The Decisions of the Ninth Circuit are Correct and Consistent with Saudi Arabia.

Exportadora misstates the holding of the Ninth Circuit in Schoenberg, where the Ninth Circuit did consider whether the case was based on commercial activity having substantial contact with the United States. Schoenberg at 780. (A 95) While the "based upon" requirement was not defined by the elements of the claim, the Ninth Circuit affirmed that Exportadora's transportation of decedents in the United States was a commercial activity having substantial contact with the United States. The case was based on arranging round-trip transportation from and to the United States through the defendant's office in the United States, and on transporting the decedents in the United States. Schoenberg at 780-782. (A 97-99).

Whether Exportadora retained a duty to transport

decedents safely was reserved in the opinion written by Judge Rymer. Schoenberg at 782 n.3. (A 99 n. 3)

The district court at trial resolved the question of retained duty. The Ninth Circuit in Sugimoto affirmed that Exportadora retained a duty to transport the passengers safely. Again, Sugimoto held the case is based upon the transportation of the decedents by Exportadora in the United States. The opinions are consistent, and each is correctly decided. Nothing is left out, nor is the basis for jurisdiction new, as Exportadora inaccurately asserts.

The petition misstates the holding in Sugimoto. Sugimoto affirmed that Exportadora controlled the transportation offered to business visitors, arranged their transportation, determined how they would come and how they would go. (A 8) The corporate transportation link enterprise remained Exportadora's, the party primarily to be benefited, who selected the contractor, was free to insist on one who is financially responsible, to demand indemnity from him, and the insurance to distribute the risk is properly a cost of Exportadora's business. (A 116) These issues were litigated at trial. Exportadora's statement to the contrary is false. (Petition at 25; A 60 - 62)

Exportadora's control was in part exercised, and the decedents' round trip travel arrangements were made, through the defendant's office in the United States. Schoenberg at 781. (A 15 F 6; A 22 F 20-23; A 47-48; A 51, F 103; A 52, F 104; A 68, F 130) Schoenberg affirmed that round-trip travel arrangements were made at the outset. (A 129, 145 n.2; A 98; A 51 F 103)

Sugimoto correctly applied Saudi Arabia in affirming that "Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space". Sugimoto at 1311. (A 7) The pilot was acting on behalf of Exportadora, in a commercial activity for which Exportadora received consideration and commercial benefit. (A 31 F 49; A 22 F 24) The trial judge's findings were not error. Anderson v. City of

Bessemer City, 470 U.S. 564, 575, 84 L.Ed.2d 518, 528, 105 S.Ct. 1504 (1985); Rule 52(a), Fed.R.Civ.P.

5. Implied Contract.

The circuits agree that arranging transportation in the United States is sufficient to confer jurisdiction where the case is based on breach of the contract of carriage arranged here. Barkanic v. CAAC, 822 F.2d 11, 13-14 (2nd Cir. 1987) (travel in China arranged in the United States); Sugarman v. Aeromexico, Inc., 626 F.2d 270, 271-273 (3rd Cir. 1980) (tickets purchased from travel agent in New Jersey for travel in Mexico).

The element of contractual duty was undertaken by Exportadora in the United States when it began to transport the passengers. Brown v. Feather River Lumber Co., 203 Cal. 493, 497-498 (1928); Wheeler v. San Francisco and Alameda R.R., 31 Cal. 46, 49, 53-54 (1866). (A 51-54)

The United States was a designated place of performance for Exportadora's obligation to transport the passengers back to San Diego. There is jurisdiction where the designated place of performance for a corporation's commercial contract is the United States and the breach of that agreement has direct effects in the United States. Republic of Argentina v. Weltover, 504 U.S. - - , 119 L.Ed.2d 394, 408, 112 S.Ct. 2160 (1992).

6. Ostensible Agency.

The passengers' reliance on Exportadora, an element of ostensible agency, began in the United States, where Exportadora accepted the passengers as the carrier for a round trip, and ended in the United States in the accident.

Additional manifestations by Exportadora to the passengers that the pilot was its agent occurred in Mexico, where the pilot was introduced by Exportadora, without disclosure of his status, as the pilot for the flight the next

day. (A 30 F 47; A 240; A 65 F 126) The facts are nearly identical to the facts in Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir. 1980), where the singer Jim Croce lost his life in an undisclosed, last minute, substituted charter flight.

The trial judge's factual finding of ostensible agency, which rested in part on Exportadora's conduct in the United States (A 65 F 126), was not clear error. Anderson v. City of Bessemer City, 470 U.S. 564, 575, 84 L.Ed.2d 518, 529-30, 105 S.Ct. 1504 (1985).

7. The Substitute was Acting as a Contract Carrier, Not Acting as a Common Carrier.

Aviones was acting as a contract carrier under a contract with Exportadora, held to a standard of ordinary care, not acting as a common carrier. (A 48 F 98) Exportadora so argued to the district court to argue for a standard of ordinary care (A 287-288), and is bound by judicial estoppel that Aviones was acting as a private carrier at the time of the accident. Yanez v. United States, 989 F.2d 323 (9th Cir. 1993); Hopkins v. Yellow Cab, 114 Cal.App.2d 394, 397-398 (1952).

A common carrier contracted to perform a special service for a company acts as a private carrier. Hopkins at 397-398. If Aviones were acting as a common carrier it would have been held to a standard of the utmost care. Andrews v. United Airlines, Inc., 24 F.3d 39, 40 (9th Cir. 1994). The fact that Aviones normally operated as a common carrier is irrelevant. (A 48) The case concerns corporate transportation for business visitors, not common carrier transportation for passengers with tickets.

C. There is No Conflict with Weltover.

Exportadora contends that its activity was not commercial because it received no payment for the flight, and the test for commercial activity should be whether the

activity is customarily carried on for a profit, citing Aschenbrenner v. Conseil Regional de Haute-Normandie, 851 F.Supp. 580, 585 (S.D.N.Y. 1994). Exportadora misstates the facts. Exportadora received valuable consideration, and commercial benefit, for the transportation of each passenger. (A 22 F 24; A 61 F 120) Exportadora's statement that benefit was not litigated is false.

The Supreme Court in Weltover rejected the "for profit" test of commercial activity: "the question is not whether the foreign government is acting with a profit motive . . . the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade, and traffic or commerce'" Weltover, 119 L.Ed.2d 394 at 405.

Exportadora is thus arguing that the Court's opinion in Weltover was incorrect, that the profit motive test should have been adopted.

Exportadora's transportation of the passengers was commercial activity, as affirmed in Schoenberg, found by the district court at trial, and affirmed in Sugimoto. In Schoenberg, the Ninth Circuit held that the nature of transporting people from one place to another is a commercial activity, and that acquiescing in a request from a stockholder is an activity that a private entity can perform. (A 95-97) At trial the district court found Exportadora's transportation to be commercial. (A 22 F 24) The decisions of the lower courts in this case are consistent with the definition of commercial activity in Weltover.

III. THERE IS NO CONFLICT WITH OTHER CIRCUITS.

A. There is No Issue of Separate Juridical Existence.

Exportadora contends that the holding in this case

conflicts with Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3rd Cir. 1993), *cert. denied sub nom.*, El Jay Travel, Inc. v. Algemeen Burgerlijk Pensionenfonds, 128 L.Ed.2d 663 (1994). In that case a holding company was the parent of two subsidiaries that entered into a joint venture to own an office building in the United States.

In Federal Insurance, the district court attributed the activities of the subsidiaries to the holding company because of its status as a parent corporation. The Third Circuit reversed, holding that "the acts of separate corporations should not be attributed to related foreign entities unless [not] doing so would 'work fraud or injustice'". Federal Insurance at 1286.

The Third Circuit also recognized that separate corporate status should be disregarded when control is so extensive as to create the relationship of principal and agent. Id. at 1287.

The present case is readily distinguishable from Federal Insurance. Exportadora did not form a subsidiary to operate its corporate transportation link. The routine company airplane flights and company van transportation were done directly by Exportadora. Exportadora itself arranged and agreed to transport the passengers round trip. Exportadora itself undertook the non-delegable duty, began the round trip transportation in the United States, and chartered a substitute air taxi for its company airplane.

A person may do by agent any act which he might do himself. 2 Witkin, Summary of California Law, 9th Ed. (1987), § 75, p. 78-79; Cal.Civ.Code § 2330. To immunize foreign states for the acts of their agents in the United States, as Exportadora asks the Court to do, would be to create a special immunity from liability for foreign states only, at the expense of the public in this country, who could not recover damages for their losses.

Every authorized agent is a separate entity of one kind or another. The issue in this case is not the same as the issue of separate corporate existence. The issue here is

the principal's commercial activity performed by an agent in the United States.

None of the grounds for liability in this case, non-delegable duty, contractual duty, or ostensible agency, were present in Federal Insurance, or in any of the other cases cited by Exportadora as to separate corporate existence.

Indeed, the opinion in this case is consistent with Federal Insurance's recognition that commercial activities are attributed where the relationship of principal and agent exists, as under a non-delegable tort duty, non-delegable contractual duty, or ostensible agency. Federal Insurance at 1287. Finally, there would be great injustice if the activities of the charter pilot were not attributed to Exportadora, whose commercial activity killed the decedents.

B. The Circuits Agree that the Principal's Commercial Activity, Carried On Through an Agent in the United States, is the Principal's Commercial Activity for Jurisdiction.

The circuits agree that under the FSIA, the principal's commercial activity, carried out through an agent in the United States, is the commercial activity of the principal. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 304, 313 (2nd Cir. 1981) (New York bank appointed as agent for letters of credit by foreign state); Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2nd Cir. 1994) (lead banks appointed agents for Kuwait in New York); Sugarman v. AeroMexico, Inc., 626 F.2d 270, 273 (3rd Cir. 1980) (travel agent sold ticket for foreign state in New Jersey); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 453 (6th Cir. 1988) (Delaware corporation acted as agent for foreign state in negotiating in United States);Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105-1107 (D.C.Cir.1982)(acts of an authorized agent may be attributed to the principal); Transamerican

Steamship Corp. v. Somali Democratic Republic, 767 F.2d 999, 1003 (D.C.Cir. 1985) (embassy of foreign state acted as collection agent for instrumentality of foreign state); Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1287 (3rd Cir. 1993), *cert. denied sub nom.*, El Jay Travel, Inc. v. Algemeen Burgerlijk Pensionenfonds, 128 L.Ed.2d 663 (1994) (activities of an agent may be attributed to the principal).

There could hardly be any other rule if business is to be transacted through agents.

III. OTHER EXCEPTIONS, ALLEGED AND ARGUED, ESTABLISH JURISDICTION.

Three other exceptions establishing jurisdiction were alleged and argued to the Ninth Circuit. Exportadora's statement that no other exceptions were considered is false.

First, under the third clause of the commercial activities exception, 28 U.S.C. § 1605(a)(2)[3], the direct effects clause, the claims arise from the commercial activity of Exportadora elsewhere that has caused a direct effect in the United States.

"Where the incident is a fatal plane crash, the direct effects are loss of life and the destruction of the aircraft." Compania Mexicana De Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354, 1360 (9th Cir. 1988). Exportadora's delegation of duty to a substitute, introducing the pilot without disclosure of his status, and sending the airplane to the San Diego-Tijuana area at a time when fog was forecast were commercial acts, elements of torts with direct effects in the United States. Vermeulen v. Renault U.S.A., Inc., 985 F.2d 1534 at 1544 n.13, *cert. denied*, 124 L.Ed.2d 246 (1993); Weltover, 119 L.Ed.2d 394 at 407.

Plaintiffs alleged the direct effects clause in the complaint (A 197 ¶ 8), set forth the clause in the pretrial order (A 208) and argued it to the Ninth Circuit in both appeals. Exportadora's statements to the contrary are false.

Second, the implied waiver exception, 28 U.S.C. § 1605(a)(1), is applicable. The defendant waived sovereign immunity in opening statement, stipulated to jurisdiction at trial to save time, and never argued sovereign immunity in closing. (A 219-220, 222-223) [14] The defendant waived sovereign immunity. Exportadora's statements that it did not waive sovereign immunity are false.

Even agreeing to a choice of law clause, to be governed by the law of the United States or of the States, is a waiver of sovereign immunity. Eckert Int'l, Inc. v. Government of Fiji, 32 F.2d 77, 80 (4th Cir. 1994). Agreeing to a trial to be governed by United States law and California law, as Exportadora did, is certainly a waiver. The question is whether the foreign state voluntarily involved the United States courts in the claims. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 721-723 (9th Cir. 1992), *cert. denied*, - - U.S. - - , 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993).

Respondents made a motion to amend the jurisdictional allegation to allege implied waiver in the Ninth Circuit under 28 U.S.C. § 1653.

Third, under the second clause of the commercial activities exception, 28 U.S.C. § 1605(a)(2)[2], the pilot's negligence is an act in the United States in connection with the commercial activity of the foreign state elsewhere.

The Court may affirm the existence of subject matter jurisdiction on any ground appearing in the record, regardless of whether the parties or the lower courts relied upon that ground. United States v. Washington, 969 F.2d 752, 755 (9th Cir. 1992). Subject matter jurisdiction is a question of law which does not depend upon the statutes identified in the pleadings. Gerritsen v. de la Madrid

[14] Exportadora's statement that the trial court refused to reconsider the issue of jurisdiction is false. Exportadora never asked the trial court to reconsider jurisdiction.

Hurtado, 819 F.2d 1511, 1515 (9th Cir. 1987).

IV. THE TWO-COURT RULE.

Two courts - the district court and the Ninth Circuit - have each twice considered the issue of jurisdiction and have ruled each time against Exportadora. The Supreme Court should not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U.S. 271, 275, 93 L.Ed. 672, 677, (1949); Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987). The "two court rule" applies.

V. CONCLUSION.

If the petition is granted, the question should be whether there is subject matter jurisdiction under the Foreign Sovereign Immunities Act, fairly including all exceptions.

Respondents respectfully submit that the Ninth Circuit has correctly applied the law. This Court's recent opinions are dispositive, and should not be reconsidered. There is no conflict between the circuits, and no issue of importance for the Court's review.

Certiorari should be denied.

Dated: October 31, 1994
Belmont, California

Respectfully submitted,

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Supreme Court, U.S.
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No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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[1] Required under Rule 14.1(k)(i) and omitted from Exportadora's Appendix.

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[3] Required under Rule 14.1(k)(ii) and omitted from Exportadora's Appendix.

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The principal statutory provisions involved in this case are 28 U.S.C. §§ 1330, 1602-1611, the Foreign Sovereign Immunities Act ("FSIA"), which provide in relevant part:

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity

with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the Untied States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial

activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605 (a)(1)-(5). General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * *

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage

to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment . . . .

* * * *

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

[19 F.3d 1309 (9th Cir. 1994)]

Hiroko SUGIMOTO; Kimiko Kodani; Mayumi Nukiwa; Eri Omachi; Kuniko Omachi, Plaintiffs-Appellees,

v.

EXPORTADORA DE SAL, S.A. DE C.V., Defendant-Appellant.

No. 93-55716.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 1, 1994.
Decided March 25, 1994.
As Amended July 1, 1994.

Wrongful death action was brought against corporation affiliated with government of Mexico, which operated salt plant in remote area of Mexico, for deaths of plant visitors in crash of air taxi chartered by corporation. The United States District Court for the Southern District of California, James M. Fitzgerald, J., held corporation liable, and corporation appealed. The Court of Appeals, Noonan, Circuit Judge, held that: (1) corporation was engaged in commercial activity in the United States when air taxi flew in United States airspace, thus conferring jurisdiction over corporation; (2) there was no clear error in conclusion that it was negligent mistake by pilot that was cause of accident; and (3) corporation was liable for pilot's negligence though pilot was employee of air taxi company.

Affirmed.

1. International Law

District court had jurisdiction over corporation

affiliated with government of Mexico in wrongful death suit arising from crash of air taxi chartered by corporation, in that corporation was engaged in commercial activity within the United States when air taxi flew in United states airspace, and element of wrongful death claim consisted in tortious flying of air taxi in United States airspace. 28 U.S.C.A. § 1605(a)(2).

2. Aviation

There was no clear error in district court's conclusion that it was negligent mistake by pilot that was cause of accident when aircraft crashed into hill in fog; rather than presuming that failure must have been pilot's, district court eliminated variety of other possible causes of crash and relied on opinion of aviation accident investigator whom it found credible and reliable.

3. Master and Servant

Under California law, rule that one is not liable for tortious acts of independent contractor can be said to be general only in sense that it [is] applied when no good reason is found for departing from it. Restatement (Second) of Torts § 409 comment.

4. Aviation

Operator of salt plant in remote area of Mexico was liable for pilot's negligence in crash of aircraft carrying plant visitors, though pilot was employee of independent air taxi company from which plane was chartered, where operator controlled transportation offered to business visitors to its plant and company town, it decided whether visitors from abroad were welcome, approved them, arranged for the transportation, paid all their expenses, and fed them, and it determined where they would stay, how they would come, and how they would go.

Clyde Greco, Jr., Greco & Traficante, San Diego, CA,

for defendant-appellant.

Robin Foor, Belmont, CA, for plaintiffs-appellees.

On Appeal from the United States District Court for the Southern District of California.

Before: TANG, PREGERSON and NOONAN, Circuit Judges.

NOONAN, Circuit Judge:

Exportadora De Sal, S.A. De C.V. (Exportadora) appeals from the judgment entered after a bench trial in a wrongful death action brought by the survivors of Katsuo Sugimoto, Yoshihito Kodani and Hideo Omachi (the plaintiffs). We have jurisdiction under 28 U.S.C. § 1330, and affirm.

FACTS

Exportadora is a manufacturer of salt owned 51 percent by the government of Mexico and 49 percent by Mitsubishi Corporation of Japan. Exportadora is a major producer of salt, which it markets internationally. It has a manufactory of salt at Guerrero Negro, Mexico. The plant is located in a company town. The most convenient city in proximity to Guerrero Negro is San Diego, California. Exportadora maintained an office in San Diego.

It is possible to get to Guerrero Negro from San Diego by bus, but the only convenient way of getting there is by Exportadora arranging a flight from Tijuana, Mexico to Guerrero Negro. For visitors to Guerrero Negro accepted by Exportadora, the practice was for the company to send a van to its San Diego office to transport them to the Tijuana airport. There was no telephone at the plant and it communicated with outside parties by telex to the San Diego

office.

On September 4, 1987 an employee of Mitsubishi asked Exportadora to provide transportation for Omachi to Guerrero Negro by car and company plane. Mitsubishi's telex noted that Omachi was a manager for Asahi, one of Exportadora's most important Japanese customers. A second telex from Mitsubishi to Exportadora stated, "We hope that your beautiful explanation and arrangements will charm him very much." A third telex thanked Exportadora for accepting "Omachi's visit to G.N."

On September 18, 1987 Mitsubishi asked Exportadora to arrange for transportation to Guerrero Negro for Sugimoto and Kodani by pick-up truck and company plane. Sugimoto and Kodani were professors of Tottori University in Japan and were interested in an agricultural project at Guerrero Negro. On September 22 Sugimoto and Kodani arrived by air in San Diego and were met by a representative of Exportadora, who arranged for their overnight stay in San Diego. The following day Exportadora had them transported to the Tijuana airport from which they flew in the company plane to Guerrero Negro. The company prepared a schedule showing that they would return to Tijuana on September 30.

On September 27 Omachi arrived at San Diego and on the following day was transported by Exportadora's van to Tijuana and by company plane to Guerrero Negro. His return was also scheduled for September 30. In Guerrero Negro Omachi, Sugimoto and Kodani were fed in the Exportadora company dining room and were housed without charge at Exportadora's guest quarters.

The company plane was not available on September 30 because of a directors' meeting. An Exportadora employee chartered an air taxi company to carry the scheduled passengers from Guerrero Negro to Tijuana.

Flying in heavy fog on the morning of September 30 in air space of the United States, the pilot of the air taxi

crashed into a hill outside of Tijuana and fell on American soil. The district court found the crash due to the pilot's negligence in descending below the proper glide path and in not executing a missed approach when required to do so.

The crash killed the pilot and the passengers.

PROCEEDINGS

The plaintiffs brought suit against Exportadora. Exportadora challenged the jurisdiction of the district court on the ground of its sovereign immunity under 28 U.S.C. §§ 1603(a), (b)(2) and when the district court held it had jurisdiction, Exportadora appealed to this court. We held that in transporting Omachi, Sugimoto and Kodani Exportadora had been engaged in commercial activity in the United States and so fell within one of the exceptions of the Foreign Sovereign Immunities Act, *viz.* "the action is based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. § 1605(a)(2). *Schoenberg v. Exportadora,* 930 F.2d 777 (9th Cir.1991). We found the commercial activity to lie in Exportadora's "arranging transportation for its prospective business partners" in the case of Omachi and appeasing the Mexican government in the case of the transportation provided to Sugimoto and Kodani. *Id.* at 780.

On remand, a bench trial was held in which the district court found Exportadora liable on the basis of several theories of liability. Exportadora appeals.

ANALYSIS

Jurisdiction

[1] Exportadora raises again the question as to jurisdiction, contending that despite *Schoenberg,* the issue remains open in the light of *Saudi Arabia v. Nelson,* -- U.S. --,

113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The plaintiffs argue that Exportadora waived jurisdiction after the decision in this court in *Schoenberg*. We need not address that argument, because we hold that under the precise test set by *Saudi Arabia* jurisdiction exists.

According to *Saudi Arabia*, an action is based on commercial activity in the United States if an element of the plaintiff's claim consists in conduct that occurred in commercial activity carried on in the United States. *Id.* -- U.S. at --, 113 S.Ct. at 1477. In the instant case Exportadora was engaged in commercial activity within the United States when the air taxi flew in United States air space, and an element of the plaintiffs' claim consists in the tortious flying of the plane in United States air space. The jurisdictional requirement of the first clause of § 1605(a)(2) was met.

Tortious Conduct

[2] On appeal Exportadora argues that the district court found pilot negligence by indulging the presumption that if the plane hit a hill in the fog, the failure must have been the pilot's. On the contrary, the district court eliminated a variety of other possible causes of the crash and relied on the opinion of an aviation accident investigator whom it found credible and reliable. There was no clear error in the district court's conclusion that it was a negligent mistake by the pilot that was the cause of the accident.

Basis for Liability

[3,4] Exportadora presses that it should not be held liable for the pilot's negligence when the pilot was the employee of the air taxi, which the district court characterized as "an independent contractor." The general rule is clear that one is not liable for the tortious acts of an independent contractor. The rule is riddled with exceptions so that there is "only a small area in which the so-called

general rule operates." 6 Witkin. *Summary of California Law* § 1009 (1987). California law in this respect is in harmony with the *Restatement (Second) of Torts* § 409, comment b, which states that the rule "can now be said to be general only in the sense that it is applied when no good reason is found for departing from it."

Here there is good reason for departing from the already-eroded rule. Exportadora controlled the transportation offered to business visitors to its plant and company town. Exportadora decided whether visitors from abroad were welcome, approved them, arranged for their transportation, paid all the expenses, fed them, determined where they would stay and how they would come and how they would go. Exportadora remains liable for the enterprise, although the air taxi was an independent taxi: "the enterprise, notwithstanding the employment of the independent contractor, remains the employer's" when it "is the party primarily to be benefited . . . selects the contractor . . . is free to insist upon one who is financially responsible, and to demand indemnity from him, [and] the insurance necessary to distribute the risk is properly a cost of the employer's business." *Van Arsdale v. Hollinger.* 68 Cal.2d 245, 253, 66 Cal.Rptr. 20, 25, 437 P.2d 508, 513 (1968). As a matter of California law Exportadora was liable for the tortious performance of the pilot.

AFFIRMED.

[Filed May 7, 1993]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	)	
	)	Civil No. 88-1532R(POR)
Plaintiffs,	)	Consolidated
	)	Civil No. 88-1920R(POR)
vs.	)	
	)	
EXPORTADORA DE SAL S.A. DE C.V., a foreign corporation,	)	
	)	
Defendants.	)	

ORDER

On March 9, 1993, I entered on the record my findings of fact and conclusions of law on Exportadora's liability in this matter. While the default judgment against defendant Aviones de Sonora had been the subject of pretrial motions, these motions were not renewed at trial. It was expected that plaintiffs would file a proposed form of judgment including Aviones with supporting memoranda for the default judgment. Instead, based on discussions between the clerk and plaintiffs' counsel, judgment was entered based on the partial findings and conclusions. Plaintiffs now move to amend both the partial findings and conclusions and the judgment. Exportadora opposes the motion. I now grant in part and deny in part the motion to amend the findings and conclusions. because the prior judgment was erroneously

entered and did not reach the liabilities of all of the parties, I hereby vacate the judgment dated March 19, 1993. I have now considered the renewed motion for default judgment against Aviones de Sonora. A new judgment including all parties is attached with this order.

The parties agree that the findings contain a clerical error in the computation of noneconomic damages for plaintiffs. I therefore amend findings 186 through 188 as follows:

> (186) I find that the present value of the economic damage sustained by Mrs. Sugimoto is $342,175. I find that Mrs. Sugimoto's life expectancy is ten years from the date of trial. The trial occurred approximately five years and three months after the accident. I find that Mrs. Sugimoto sustained a noneconomic loss of $20,000 per year. Mrs. Sugimoto's noneconomic damage before trial amounts to $105,000. The present value of Mrs. Sugimoto's noneconomic damage after trial is $170,604. Mrs. Sugimoto's total damage amounts to $617,779.
>
> (187) I find that the present value of the economic damage sustained by Mrs. Kodani is $604,239. I find that Mr. Kodani's life expectancy is nineteen years from the date of trial. I find that Mrs. Kodani sustained a noneconomic loss of $25,000 per year. Mrs. Kodani's noneconomic damage before trial amounts to $131,250. The present value of Mrs. Kodani's noneconomic damage after trial is $358,000. Mrs. Kodani's total damage amounts to $1,093,489.
>
> (188) I find that the present value of the economic damage sustained by Mrs. Omachi is $1,435,222. I find that Mr. Omachi's life expectancy is thirty-one years from the date of trial. I find that Mrs. Omachi sustained a noneconomic loss of $25,000 per year. Mrs. Omachi's noneconomic damage before

trial amounts to $131,250. The present value of Mrs. Omachi's noneconomic damage after trial is $500,000. Mrs. Omachi's total damage amounts to $2,066,472.

The attached judgment incorporates these new damage amounts.

Page 14, line 8 is amended to correctly state the year of the accident as 1987. Page 86, line 18 is amended to read "Exportadora was responsible for the flight of XAKOA from Guerrero Negro to". Page 96, line 11 is amended to read "Plaintiffs have failed to carry their burden of". Page 100, line 14 is amended to read "Mayumi, the oldest, and the second daughter Kyoko". The first word on line 6 of page 114 should be "occasions" rather than "occasion".

This court rejected the claims of Mayumi Nukiwa and Eri Omachi for damages based on the evidence presented at trial. Ms. Nukiwa's claims of economic damage from the loss of expected gifts were not sufficiently supported by the evidence at trial. Ms. Nukiwa has not lived with her father for some time and her claim for noneconomic damage for the loss of his companionship was is rejected. Eri Omachi's claim for noneconomic and economic damage is primarily based on a figure of five hours of teaching and advice. This figure was given to plaintiffs' economics expert by plaintiffs' counsel. It was not sufficiently supported by the record. Plaintiffs' claims for damages for Mayumi Nukiwa and Eri Omachi are rejected on the evidence.

Plaintiffs' request to change the damage award for the change in the value of the Yen is rejected. Mutuelles Unies v. Kroll & Linstrom, 957 F.2d 707, 714 (9th Cir. 1992). Plaintiffs' attempt to amend the findings on pension contributions and retirement is rejected. Defendant Exportadora's attempt to use an alleged error in post-retirement compensation as an offset to damages is rejected. Plaintiffs' repeated request that this court affirm the jurisdictional ruling in Schoenberg v. Exportadora de Sal, 930 F.2d 777 (9th Cir. 1991), to "prevent Exportadora from arguing the opposite on appeal" is denied.

Dated this 5 day of May, 1993, at Anchorage, Alaska.

/s/
JAMES M. FITZGERALD
United states District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1919-JLI
Plaintiffs,	)	MEMORANDUM DECISION
V.	)	AND ORDER
EXPORTADORA DE SAL, S.A. DE C.V a foreign corporation et al.,	)	[Filed June 29, 1989]
Defendants.	)	
HIROKO SUGIMOTO, et al.,	)	Civil No. 88-1920-JLI
Plaintiffs,	)	
v.	)	
EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,	)	
Defendants.	)	
DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1530-JLI
Plaintiffs,	)	

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

CARMEN HERNANDEZ, et al.,

Civil No. 88-1531-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

HIROKO SUGIMOTO, et al.,

Civil No. 88-1532-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

This cause came on to be heard on July 5, 1989. Gerald Sterns, Robin Foor and Robert Aaron appeared on behalf of the plaintiffs. John Stephens appeared on behalf of defendant Exportadora de Sal, S.A. de C.V. ("Exportadora"). Having reviewed the oral and written arguments of the parties, the court hereby issues the following memorandum decision and order.

FACTS

These five actions arise out of the crash of a small aircraft in the United States as the aircraft approached the General Rodriguez International Airport in Tijuana, Mexico ("Tijuana Airport"). The plane was on route to Tijuana from Guerrero Negro, Baja California. Defendant Exportadora had chartered the plane from defendant Aviones De Sonora ("Aviones") to transport five passengers. On approach to Tijuana Airport through United States airspace, the plane encountered bad weather and struck the ground north of the United States/Mexican border. All five passengers and the pilot were killed. The plaintiffs in these cases are the passengers' survivors.

Exportadora is a corporation formed under the laws of Mexico and is 51% owned by defendant United Mexican States. Exportadora mines salt from the sea at Guerrero Negro and sells it on domestic and international markets. Guerrero Negro is two and one half hours by plane from Tijuana and is inaccessible except by air. Exportadora also has an office in San Diego that employs 10 persons and includes a large warehouse. The San Diego office handles the communications and shipping/transportation necessary for Exportadora's enterprise. Because Guerrero Negro had no telephone service, Exportadora is required to set up a telex between the two offices, and all communication between Guerrero Negro and the outside world is communicated through the San Diego office.

Exportadora maintains an air link between these two offices. An Exportadora corporate aircraft regularly flew

between Guerrero Negro and Tijuana Airport. To complete the trip to San Diego, an Exportadora van from the San Diego office would drop off or pick up passengers at the Tijuana Airport.

The decedents in these cases made their arrangements for transportation from San Diego to Guerrero Negro through the San Diego office, although the decisions to allow the passengers to travel aboard Exportadora's vehicles were made in Guerrero Negro. At the beginning of the trip, the passengers were picked up by the Exportadora van in San Diego and driven across the border into Tijuana for the flight south. Upon their return, the same van was to pick the passengers up at the Tijuana Airport and take them back to San Diego. The company plane was unavailable on the day of the return flight, so Exportadora hired Aviones to fly the passengers on their ill-fated trip to Tijuana.

The reasons the passengers visited Guerrero Negro vary. Mr. Schoenberg and Mr. Hernandez visited the salt mines allegedly to solicit orders for pumps produced by their employer, Berkeley Pump Corporation. Exportadora had previously purchased such pumps. Mr. Sugimoto and Mr. Kodani visited an agricultural station located next to Exportadora's facilities as representatives of Tottori University in Hamasaka, Japan. The Mexican Government requested that Exportadora transport them to Guerrero Negro and back. Mr. Omachi was a purchasing agent for Asahi Chemical Company of Japan. Asahi allegedly purchased a significant quantity of salt from Exportadora, and Omachi met with employees of Exportadora while in Guerrero Negro.

DISCUSSION

A. Foreign Sovereign Immunities Act

Exportadora contends that this court lacks subject matter jurisdiction over this case under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. §§ 1330, 1602

et seq. The FSIA immunizes foreign states and their instrumentalities[1] from the jurisdiction of United States courts unless the matter falls into one of the statutory exceptions to immunity. If the claim does not fall within one of the enumerated exceptions, the court cannot entertain the action and must dismiss the action against the foreign state for lack of jurisdiction. Security Pacific National Bank v. Derderian, 872 F. 2d 281, 284-85 (9th Cir. 1989).

Under 28 U.S.C. § 1605(a)(2), the "commercial activity exception" to the FSIA, a foreign sovereign can be sued in actions which are:

> [1] based upon a commercial activity carried on in the United States by the foreign state; [2] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity in the foreign state elsewhere and that act causes a direct effect in the United States.

Exportadora argues that none of these three predicates to the exception is present in these cases. The plaintiffs contend that all three predicates exist. This court finds these actions fall within the first predicate of the commercial activity exception and, therefore, this court concludes that it has subject matter jurisdiction under the FSIA.

B. Commercial Activity in the United States

In order to find that an action is based upon commercial activity carried on in the United States by foreign state, the court must determine if the activity is

---

[1]The FSIA governs corporations like Exportadora in which a foregn government has a majority interest. 28 U.S.C. § 1603(b).

indeed "commercial" and whether the activity resulted in "substantial contact" with the United States. 28 U.S.C. § 1603 (e). Moreover, the "FSIA requires that there be a significant 'nexus' between the cause of action and the 'commercial activity' carried on in the United States." Compania Mexican De Aviaction v. U.S. District Court, 859 F.2d 1354, 1360 (9th Cir. 1988). The commercial activity relied upon by the plaintiffs to establish jurisdiction must be the activity upon which the lawsuit is based. "The focus must be solely upon 'those specific acts that form the basis of the suit.'" American West Airlines v. GPA Group, No. 88-1657, slip op. 6193, 6200 (9th Cir. June 12, 1989) (quoting Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1023 (9th Cir. 1987)).

1. Transportation of Passengers Was Commercial Activity

Exportadora's conduct in transporting the passengers from San Diego to Guerrero Negro was commercial activity. The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603 (d). The court is to look at the nature rather than the purpose of the activity in question. "Nevertheless, the purpose of an act may be relevant in defining its nature: "[o]ften, the essence of an act is defined by its purpose." Joseph at 1023 (quoting De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985)).

As part of its commercial operations, Exportadora maintained an air link between Guerrero Negro and San Diego, its two places of business. Exportadora usually employed its corporate aircraft for the Guerrero Negro to Tijuana portion of the journey, and it was a common practice for an Exportadora van to carry out the Tijuana to San Diego leg of the trip. This court finds that this general activity by Exportadora of providing a convenient and efficient means of connecting the two offices is commercial

activity by Exportadora.

Further, the specific purpose for which a majority of the passengers were aboard the aircraft was closely related to Exportadora's commercial enterprise. Mr. Schoenberg and Mr. Hernandez flew to Guerrero Negro to solicit business. They planned on selling water pumps to Exportadora which were to be used in Exportadora's mining operation. They did not arrive uninvited; Exportadora arranged and paid for their trip to Guerrero Negro. Mr. Omachi also flew down to Guerrero Negro at Exportadora's expense. The business reason for his trip is not clear, but apparently he was there as a purchaser of salt for his Japanese corporation.

As for the Japanese passengers from Tottori University, while it appears that their purpose in traveling to Guerrero Negro was not closely related to Exportadora's commercial activity, Exportadora's management transported these passengers at the request of the corporation's majority stockholder. This court finds it unnecessary to decide whether this request was based on commercial, political or charitable considerations. The management and shareholders of Exportadora obviously thought ferrying these researchers was appropriately within the corporation's purpose. It is enough that Exportadora acquiesced and transported these passengers as part of its routine activity of providing an air link between corporate offices.[2]

2. Transportation of Passengers in the U.S. Had Significant Nexus With These Causes of Action

Exportadora's transportation of the passengers within San Diego constituted activity in the United States. The issue is whether these causes of action have a significant nexus with this activity.

The circumstances of this case places it between Compania Mexicana De Aviacion v. U.S. District Court, 859 F.2d 1354 (9th Cir. 1988), and Sugarman v. Aeromexico, 626 F.2d 270 (3rd Cir. 1980). In Compania a group of Mexican nationals sued an airline owned by the Mexican government

for wrongful death based on a crash of a domestic Mexican flight shortly after takeoff from Mexico City. The plaintiffs sought to invoke the commercial activity exception to the FSIA. They argued there was a significant nexus between the cause of action and the defendant's commercial activity in the United States since the airline carried on commercial activity in the United States by having flights to the United States, and since the plane which crashed was in Chicago the day before and was eventually destined for Los Angeles. The court rejected this argument: "If this is a sufficient nexus, all airline crashes by government-owned carriers that stop in the United States would fall within the jurisdiction of the United States. Such a result is not compatible with either the FSIA or the Warsaw Convention." Id. at 1360. The present case is distinguishable from Compania. Although both cases deal with a foreign corporation flying persons from one Mexican city to another, in this case there is ground transportation to and from San Diego and the

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[2]At oral argument Exportadora for the first time characterized its activity of transporting the Tottori University passengers as governmental conduct. It cited Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980). In Arango the plaintiffs were "involuntarily rerouted" after arriving in the Dominican Republic on the government-owned airline "Dominicana." Dominican immigration officials ordered the expulsion and "impressed" Dominicana to carry it out. The court held Dominicana's actions were governmental in nature since it acted "merely as an arm or agent of the Dominican government . . . ." Id. at 1379.

Arango does not apply. There is no evidence the Mexican government "impressed" Exportadora pursuant to Mexican law to transport the Tottori University passengers. The record only shows that Exportadora periodically assisted the agricultural project upon "instructions" from the Mexican government. Further, Arango involved official acts by immigration officers which are activities "only a sovereign state can perform." Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1024 (9th Cir. 1987). The instruction of the government of Mexico was the command of a majority shareholder to the corporation that any private majority shareholder could give and is not the mark of a state acting in its sovereign capacity.

passenger's arrangements for the trip through Exportadora's San Diego office. These factors create a more substantial nexus than existed in Compania.

The Sugarman case, like the Compania case, concerned foreign air travel. The plaintiff in Sugarman alleged that a delay at the Acapulco airport before the departure of his Aeromexico (a government-owned carrier) flight back to Newark caused him health problems. The court found the fact that the delay took place on a leg of a round trip to the United States and the fact that the plaintiff bought his tickets in the United States, established a sufficient nexus between the acts which gave rise to the action and the carrier's commercial activity in the United States. Id. at 273.

The only distinction between Sugarman and the present case is that part of the trip in the present case was by Exportadora's van and in the present case the "carrier" was forced to charter the return flight due to the unavailability of its own aircraft. These distinctions are not significant.

C. CONCLUSION

This court finds that these actions are based upon commercial activity by a foreign state in the United States. Exportadora is not immune under the FSIA and its motion to dismiss is denied.[3]

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[3]This court notes, without deciding, that it is probable that the third predicate to the commercial activity exception also applies in these cases. These cases are based on commercial activity outside of the United States which caused a substantial effect in the United States. There is no doubt that one aspect of Exportadora's commercial activities -- the air crash -- had a substantial effect in the United States. The issue is whether this effect was sufficiently direct and foreseeable. Derderian at 286. Since Exportadora regularly flew into Tijuana Airport which utilizes United States' airspace and since Exportadora arranged transportation between Guerrero Negro and San Diego, such an effect would appear to be foreseeable.

IT IS SO ORDERED.

DATED: JUNE 28, 1989

/s/
J. LAWRENCE IRVING, JUDGE
UNITED STATES DISTRICT COURT

COPIES TO:

ALL COUNSEL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1919-JLI
Plaintiffs,	)	MEMORANDUM DECISION
V.	)	AND ORDER
EXPORTADORA DE SAL, S.A. DE C.V a foreign corporation et al.,	)	[Filed August 8, 1989] [Entered August 31, 1989]
Defendants.	)	
HIROKO SUGIMOTO, et al.,	)	Civil No. 88-1920-JLI
Plaintiffs,	)	
v.	)	
EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,	)	
Defendants.	)	
DOREEN S. SCHOENBERG, et al.,	)	Civil No. 88-1530-JLI
Plaintiffs,	)	

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

CARMEN HERNANDEZ, et al.,

Civil No. 88-1531-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

HIROKO SUGIMOTO, et al.,

Civil No. 88-1532-JLI

Plaintiffs,

v.

EXPORTADORA DE SAL, S.A. DE C.V. a foreign corporation et al.,

Defendants.

This cause came on to be heard on July 17, 1989.

Gerald Sterns, Robin Foor and Robert Aaron appeared on behalf of the plaintiffs. John Stephens appeared on behalf of defendant Exportadora de Sal, S.A. de C.V. ("Exportadora"). The United Mexican States ("UMS") appeared pro se; Miguel Angel Gonzales was present on its behalf. Having reviewed the oral and written arguments of the parties, the court hereby issues this memorandum decision and order.

FACTS

These factual findings contained in the court's previous Memorandum Decision and Order, dated July 5, 1989, are incorporated herein. These five actions, which the court ordered consolidated at the July 17 hearing, arise out of the crash of an aircraft as it approached the Tijuana Airport in Tijuana, Mexico. At the time of the crash, the aircraft was flying through United States airspace pursuant to a Letter Agreement ("Letter Agreement"), dated June 15, 1987, between the United States air traffic control facility in San Diego ("San Diego TRACON") and the air traffic control facility for Tijuana Airport ("Tijuana Approach"). The aircraft crashed just north of the border, killing all aboard.

The exact cause of the crash is in dispute. The plaintiffs allege that the Mexican controller in communication with the aircraft wrongfully urged the pilot to make an approach into Tijuana Airport despite the bad weather and the pilot's request for an alternative landing site. The plaintiffs also allege San Diego TRACON failed to take certain actions as allegedly required by the Letter Agreement. Most importantly, the plaintiffs contend that San Diego TRACON failed to assign a transponder or beacon code to the aircraft thereby preventing the San Diego TRACON air traffic control computers from generating a low altitude warning to alert the U.S. controllers that the aircraft was too low on its approach.

DISCUSSION

A. UMS' MOTION TO DISMISS UNDER THE FSIA

UMS contends that this court lacks subject matter jurisdiction over this case under the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. §§ 1330, 1602 et seq. The FSIA immunizes foreign states from the jurisdiction of United States courts unless the matter falls into one of the statutory exceptions to immunity. If the claim does not fall within one of the enumerated exceptions, the court cannot entertain the action and must dismiss the action against the foreign state for lack of jurisdiction. Security Pacific National Bank v. Derderian, 872 F.2d 281, 284-85 (9th Cir. 1989).

At issue in this motion is the non-commercial tort exception to the FSIA. This provision states in part that a foreign sovereign can be sued in actions:

> in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

28 U.S.C. § 1606(a)(5).

This exception has been construed as mandating not only that the injury take place in the United States, but that all of the tortious conduct making up at least one cognizable tort take place here as well. Olsen v. Government of Mexico, 729 F.2d 641, 646 (9th Cir. 1984). The D.C. Circuit has come to a similar conclusion concerning § 1605(a)(5): the entire tort must have taken place in the United States. Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517, 1524 (D.C. Cir. 1984) (Scalia, J.); Persinger v.

Islamic Republic of Iran, 729 F.2d 835, 842 (D.C. Cir. 1984).

Olsen was case much like this one. A plane owned and operated by the Mexican government crashed in the United States on approach to Tijuana Airport. As in this case, there were many alleged causes of the accident including the negligence of the pilot, improper aircraft maintenance and the negligence of the Mexican and United States controllers. Olsen at 645-46.

UMS claimed in Olsen that there was no subject matter jurisdiction under the FSIA. Citing Matter of SEDCO, 543 F. Supp. 561, 567 (S.D. Tex. 1982), UMS contended that section 1605(a)(5) requires all of the tortious conduct to occur in the United States before a foreign state will be denied immunity. UMS noted that some of UMS' allegedly tortious acts or omissions took place outside the United States--such as the maintenance of the aircraft and an inoperative radar at Tijuana airport. Under the reasoning of SEDCO, argued UMS, the noncommercial tort exception did not apply.

The Ninth Circuit rejected this argument:

> By requiring every aspect of the tortious conduct to occur in the United States, a rule such as in SEDCO would encourage foreign states to allege that some tortious conduct occurred outside of the United States. The foreign state would thus be able to establish immunity and diminish the rights of injured persons seeking recovery . . . . Consequently, we hold that if plaintiffs allege at least one entire tort occurring in the United States, they may claim under section 1605(a)(5). In this case, the appellants allege conduct constituting a single tort -- the negligent piloting of the aircraft -- which occurred in the United States. We are satisfied that appellants have alleged sufficient conduct occurring in the United States to bring this case within the non-commercial torts exception as expressed in § 1605(a)(5) and its legislative history.

Olsen at 646.

It is the clear holding of Olsen that in order for a plaintiff to establish jurisdiction over a foreign sovereign under § 1605(a)(5) of the FSIA, the plaintiff must prove the foreign sovereign committed at least one entire tort in the United States. As a necessary corollary a plaintiff at a minimum, must establish that the foreign state took some wrongful action in the United States. See Asociacion de Reclamantes, 735 F.2d at 1524; Persinger 729 F.2d at 842.

In this case, defendant UMS makes a simple argument: since it is not alleged that it engaged in any conduct in the United States, Olsen requires a finding that subject matter jurisdiction does not exist under the FSIA. In Olsen the Mexican government owned the plane and its agents flew it. The alleged wrongful operation of the plane by employees of the Mexican government in United States airspace constituted an entire tort occurring in the United States. In this case, argues UMS, the plane was operated by a private company and the only action the Mexican government undertook was controlling the plane through United States airspace. This alleged wrongful conduct occurred in Mexico. Thus, UMS contends, § 1605(a)(5) does not apply and there is no jurisdiction.

The plaintiffs bring essentially three contentions against UMS' argument.

1. U.S. Controllers Acted As Agents Of Mexico

The non-commercial tort exception applies if the wrongful act or omission is performed by any official or employee of the foreign state while acting within the scope of employment. Thus, the exception invokes the doctrine of respondeat superior. Skeen v. Federative Republic of Brazil, 566 F. Supp. 1414, 1417 (D.D.C. 1983). The court should look to state law to determine the existence and scope of the employment or agency. Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1025 (9th Cir. 1987).

The plaintiffs allege that as the aircraft approached

the Tijuana Airport San Diego TRACON was acting as an agent of UMS pursuant to the Letter Agreement. The plaintiffs claim that San Diego TRACON wrongfully failed to act in four ways: 1) it failed to approve the flight's entering into U.S. airspace; 2) it failed to individually co-ordinate with the flight; 3) it failed to issue a specific transponder code; and 4) it failed to assign a radar point out. San Diego TRACON was allegedly required to perform all of these actions under the Letter Agreement. UMS argues on the contrary that the Letter Agreement created no agency relationship between the two governments.

"An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called an agency." Cal. Civ, Code § 2295. The most significant factor tending to show agency or employment is the right of the principal or employer to control the details of the work, Tieberg v. Unemployment. Insurance. Appeals. Board., 2 Cal. 3d 943, 950 (1970); and conversely, freedom from such control tends to establish the relationship of independent contract. Green v. Sole, 145 Cal. 96 (1904). It is not the control actually exercised, but that which may be exercised (the right of control) which determines the issue of employment or independent contract relationship. 1 Witkins, Summary of California Law, pg. 651. Besides the right of control, California courts have identified the following factors to use in analyzing whether a person is an agent or an independent contractor:

1. Does the alleged agent have a distinct occupation, does he work outside of the alleged principal's premises, and is he paid a salary or piecemeal?

2. Does the agreement's language imply the principal's right of control over the details of the relationship?

3. Does the agent own the instrumentalities of his occupation and are these tools of substantial value?

4. What are the parties beliefs as to their relationship?

Tieberg at 950-54; see also Restatement Second of Agency,

§220 (for similar list).

Applying these factors to the relationship between San Diego TRACON and the Mexican government, it is clear that San Diego TRACON was not an agent of the Mexican government. The most important factor is UMS' right of control over the details of San Diego TRACON's operations. The Letter Agreement indicates that Mexico had no meaningful right of control over TRACON's operations. The agreement specifies certain actions that both Tijuana Approach and San Diego TRACON are to take in coordinating the transfer of flights arriving and departing Tijuana Airport through U.S. airspace. Nowhere in the agreement does it state or imply, apart from the specific instructions in the Letter Agreement, that Mexico can dictate to San Diego TRACON anything related to its operations. Indeed, it does not even appear that Mexico can require San Diego TRACON on a flight-by-flight basis to approve the use of the U.S. approach. Mexico must seek approval for each aircraft prior to commencing approach.

Even the specific action that the plaintiffs allege San Diego TRACON failed to perform are not required by the language of the Letter Agreement. San Diego TRACON is not required to approve flights requesting the use of United States airspace. See Letter Agreement, Para. 4(b). Tijuana Approach, and not San Diego TRACON, has the obligation of "individually co-ordinating" flights. Id. Further, Tijuana Approach is to advise each aircraft of the transponder code, Id., Para. 4(c)(2), but there is nothing in the agreement which says that San Diego TRACON is required to provide such a code. Finally, Tijuana Approach, not San Diego TRACON, is required to "accomplish a radar point-out to San Diego TRACON prior to crossing the border." Id., Para. 4(c)(2). The Letter Agreement does not give to Tijuana Approach any control over the operations of San Diego TRACON.

The other factors used to determine agency also lead the court to conclude that San Diego TRACON was not an agent of Mexico. There is no evidence that the United

States controllers are paid by the Mexican Government for these services. The United States controllers use their own, presumably expensive, instruments and do not perform their duties in Mexican facilities. Finally, there is little evidence of what the alleged agents and principal believed their relationship to be, but the evidence introduced suggests the San Diego TRACON personnel did not feel it was their responsibility to guide aircraft destined for Tijuana Airport; indeed, it was rare that they would even speak with them over the radio. Canfield Deposition at 50-51. See also, Vaughn Deposition at 60, 63; Bowen Deposition at 31.

In short, the Letter Agreement does not provide for San Diego TRACON to act as the controller for flights approaching Tijuana Airport through United States airspace. It does not even provide that San Diego TRACON is to assist Tijuana Approach in its duties. Instead, the procedures are prudent safety measures apparently designed to allow Mexico to use this portion of United States airspace without causing confusion for United States controllers or other aircraft using the space. As UMS points out, if anything the agreement suggests that it is the U.S. government who gives authorization to Mexico for how they are to use United States airspace. Therefore, the court finds that there is no agency relationship between the Mexican government and San Diego TRACON.[1]

2. Entire Tort Occurred In U.S.

In various ways, the plaintiffs argue that the whole tort allegedly committed by the Mexican controller took place in the United States.

The plaintiffs first argue that UMS violated United States law by wrongfully controlling an aircraft in U.S. airspace. The plaintiffs cite law to establish that if the Mexican controller was controlling an aircraft from a United States control tower, he and the United States could be liable for his wrongful conduct. This argument does nothing to establish that UMS committed at least one entire tort in

the United States. At most it shows that the Mexican controller may have violated United States law.

The plaintiffs also argue that under California law a tort occurs where the last event necessary to make the defendant liable takes place. Southern Arizona York Refrigeration Co. v. Bush Mfg. Co., 331 F.2d 1 (9th Cir. 1964). However, in Southern Arizona the issue was which forum's law applied, not what constitutes an entire tort under the FSIA. Moore v. Greene, 431 F.2d 584 (9th Cir. 1970), the other case plaintiffs cite for this purpose, also involved a conflict of laws issue. It is not on point because the court in Moore did not determine where the tort occurred; but only determined which forum had more of an interest in having its law applied to the incident. Id. at 589.

Finally, the plaintiffs argue that under California law a person can be liable for inciting dangerous activity over the radio. Weirum v. R.K.O. General, Inc., 15 Cal.3d 40 (1975). The plaintiffs' citation of this case does not help them circumvent the crucial fact: UMS committed no act,

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[1]The Fourth Proposed Amended Complaint contains the allegation that TRACON was the agent of the Mexican government. Normally, on a motion to dismiss the allegations in the complaint are accepted as true. However, both sides have introduced affidavits which converts this motions into a motion for summary judgment. F.R.C.P. Rule 12(b).

The plaintiffs contend that the existence of an agency is a question of fact, 1 Witkins, Summary of California Law, pg. 701, and presumably contend that the issue is one which must be resolved at trial. However, a question of fact does not prohibit this court from ruling upon UMS' motion at this time. The FSIA requires that UMS be given a court trial. 28 U.S.C. sec. 1330(a); Arango v. Guzman Travel Advisors, 761 F.2d 1527, 1531-35 (11th Cir. 1985). There is nothing that has been submitted to the court on this issue which necessitates the hearing of live testimony. The parties also have not indicated that they have any further evidence to present on the subject. Furthermore, because the subject matter jurisdiction of the court is at issue, it is "essential" that questions of foreign sovereign immunity be determined as a preliminary matter. Security Pacific National Bank v. Derderian, 872 F.2d 281, 283 (9th Cir. 1989).

wrongful or otherwise, in the United States. The Mexican controller may have incited the pilot to crash his plane, but he did this while in Mexico.

3. Congress Intended This Type of Accident To Be Within Exception

The Plaintiffs argue that Congress intended for federal courts to have jurisdiction over foreign states involved in accidents such as this one. They argue that Congress took into account the strong policy considerations of deterring negligent conduct and compensating victims when it created the noncommercial tort exception and that these policies are forwarded by applying the exception to the facts of this case.

The purpose of the noncommercial tort exception is "to permit the victim of a traffic accident or other non-commercial tort to maintain an action against the foreign state to the extent otherwise provided by law." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976) 16, 21, 1976 U.S. Code Cong. & Admin. News, 6604, 6620. The House Report states that the exception is "directed primarily at the problem of traffic accidents . . . ." Id. at 6619. The legislative history does not specifically refer to a congressional policy of deterrence or compensation underlying the rule, although it can be presumed that Congress wished to provide a domestic remedy for those injured by a foreign state's conduct in the United States. See Persinger at 840 (giving local citizens effective redress in U.S. courts as one purpose behind the exception).

The plaintiffs describe this incident as merely another type of traffic accident. Accepting plaintiffs' characterization does not circumvent the difficulty that all of the alleged wrongful conduct by UMS which led to this accident occurred outside of the United States. The plaintiffs' argument ignores other aspects of the legislative history which have lead courts to find that Congress intended section 1605(a)(5) to apply only to wrongful conduct by the foreign state committed in the United States. Id. This congressional

intent deserves the same consideration as an alleged intent to deter and compensate. In any case, legislative history cannot prevent the court from following the law of this circuit.

B. CHOICE OF LAW

Defendant Exportadora argues that Mexican law limiting damages for wrongful death should apply in this case. The plaintiffs contend that California law applies. Under Mexican law, damages for death in aircraft accidents is limited to "an amount equal to the minimum salary of six thousand seven hundred and eighty days." Article 342, First Section Chapter XIII of the Federal Law of General Ways, Declaration & Affidavit of Zack V. Chayet, Exhibit 2. California has no limit on the amount which can be recovered in a wrongful death suit.

It is not disputed that California's choice of law rules govern this issue. California courts have applied a "comparative impairment" approach to choice of law questions. In this approach courts first endeavor to discover if there is a "true conflict": whether each state has an interest in having its rule of decision applied. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 319 (1976). If a true conflict exists, California courts then seek "to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. This analysis proceeds on the principle that true conflict should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied." Id. at 320.

There is a true conflict in this case. Mexico has an interest in seeing that the policy of limiting damages for wrongful death is applied to its citizens; arguably in promulgating the law, the Mexican government sought to protect defendants like Exportadora from large damage claims arising from its activities. See Hurtado v. Superior Court, 11 Cal. 3d 574, 583 (1974). California has two interests here: 1) the deterrence of wrongful conduct inside

its borders, and 2) compensating the plaintiffs who are California residents for the injuries they suffered. Id. at 584.

Having determined there is a true conflict, the court must seek to determine the relative commitment by each state to having its rule of decision applied to the case at hand.

As to the plaintiffs who are California residents, the court finds that California case law is dispositive. In Hall v. University of Nevada, 74 Cal. App. 3d 280 (1977), plaintiffs sued the state institution claiming that an employee of the University of Nevada, while on official business, collided with the plaintiffs' vehicle. The accident took place in California and the plaintiffs were California residents. Nevada limited the amount of money that could be collected from state entities in personal injury actions: $25,000 per person. Nevada sought to have that limitation apply under California's choice of law rules.

The Hall court examined the conflicting interests of the states and held that the Nevada limitation did not apply.

> In the instant case Nevada advances as its policy, the fact that if its liability were not limited, its residents would suffer financially, due to the increased cost of insurance for Nevada vehicles being operated outside of the state. California's policy interest lies in providing full protection to those who are injured on its highways through the negligence of both residents and nonresidents.

Id. at 285-86.

The same reasoning applies to this case. California has an interest in making its airspace safe. It also has an interest in compensating its resident survivors. In having its corporations transport passengers in California airspace, Mexico should fully expect to be held accountable under California law.

Exportadora argues that the comparative impairment analysis in this case differs from that in Hall. As noted

above, in determining which law to apply, comparative impairment analysis requires the court to determine the relative commitment of the respective states to the laws involved. This includes examining whether "the same policy may easily be satisfied by some means other than enforcement of the statute itself." Offshore Rental Co. v. Continental Oil Co., 22 Cal. 3d 157, 166 (1978). The Offshore court gave as an example the feasibility of the purchase of insurance by tort victims as another means of fulfilling a statute designed to compensate tort victims. "The fact that parties may reasonably be expected to plan their transactions with insurance in mind may therefore constitute a relevant element in the resolution of a true conflict [of laws]." Id. See also Bernhard v. Harrah's Club, 16 Cal. 3d 313, 323 (1976) (Nevada's interest in protecting its tavern owners from liability for selling alcohol to intoxicated persons could be forwarded by buying insurance against California residents who become involved in accidents after drinking in Nevada bars).

The Hall court based its decision in part on the ability of the State of Nevada to purchase additional insurance for its activity in California. The court said that this was a reasonable and foreseeable expense which would satisfy Nevada's interest in not being exposed to significant liability. Hall at 286.

Distinguishing Hall, Exportadora argues that it was relatively unforeseeable that the transporting of these passengers would have any connection with California. It could not have anticipated the need to buy insurance so consequently there is not easy alternative means of forwarding Mexico's interest in limiting the severe economic impact of large damage awards on its residents. On the other hand, Exportadora argues that the decedents voluntarily travelled to Mexico and could have easily purchased insurance to satisfy California's interest in securing compensation for its residents.

The court does not find Exportadora's argument convincing. It is foreseeable that an accident could happen

in California arising out of the transportation of these passengers.[2] Further, Exportadora, as a business with offices in California, was in a better position to protect Mexico's interest in protecting residents from large damage awards than the plaintiffs, as the survivors of the deceased, were in protecting California's interest in ensuring their compensation. Finally, Exportadora does not suggest how California's interest in deterring wrongful conduct is satisfied by means other than applying unlimited damages. Therefore, Mexico's limitations on damages should not apply to the California plaintiffs.

California's interest in seeing its wrongful death law applied is not as great for the group of Japanese plaintiffs, the Argentine plaintiff and for the plaintiff who resides in New York.[3] A failure to apply California's unlimited recovery law to the out-of-state plaintiffs obviously does not impair California's interest in seeing its residents compensated, but it does impair California's interest in deterring wrongful conduct.

As to the out-of-state plaintiffs, the court finds that California's interest in this case is more likely to be impaired by a failure to apply its law than is Mexico's interest by a

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[2]The parties dispute the frequency in which United States airspace was used by aircraft in approaching Tijuana Airport. Resolving this dispute is unnecessary. As the court found in its July 5, 1989, Memorandum Decision and Order, Exportadora arranged for round trip transportation between Guerrero Negro and San Diego. It was entirely foreseeable to Exportadora that passengers could be injured in the United States on a trip to the United States.

[3]Exportadora argues that California has no interest in such a case, relying upon Reich v. Purcell, 67 Cal 2d 551 (1967). However, the California Supreme Court in Hurtado specifically rejected this reading of Reich, Hurtado at 582. Instead, the court found that "one of the primary purposes of a state in creating a cause of action in the heirs for the wrongful death of a decedent is to deter the kind of conduct within its borders which wrongfully take a life." Id. at 583.

failure to apply Mexican law. As noted above, Exportadora can protect Mexico's interest by purchasing insurance. But there is no such easy alternative available to California to ensure that foreign corporations transport passengers safely within its territory.

Further, even if the court found California's and Mexico's commitments to be equally strong, the result would probably not differ. California courts have not yet confronted a situation where, under the comparative impairment analysis, the states' interests were found to be equal. In such a situation, it is likely that the courts would use either the old rule of lex loci delecti or create a blanket rule that the law of the forum applies. See In Re Aircrash Disaster Near Chicago, Illinois, 644 F. 2d 594, 626 (1981). In either instance, California law applies.[4]

ORDER

1. Defendant United Mexican States' motion to dismiss for lack jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602 et seq., is granted.

2. Defendant Exportadora de Sal's motion for partial summary judgment is denied. California's rule of decision regarding damage awards in wrongful death actions applies as to all of the plaintiffs.

IT IS SO ORDERED.

DATED: August 7, 1989.

/s/
J. LAWRENCE IRVING, JUDGE
UNITED STATES DISTRICT COURT

COPIES TO:
ALL COUNSEL

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[4]The court's decision as the choice of law question is limited to the arguments and parties before the court.

[Filed May 7, 1993]
[Entered May 11, 1993]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	)	
	)	Civil No. 88-1532R(POR)
Plaintiffs,	)	Consolidated
	)	Civil No. 88-1920R(POR)
vs.	)	
	)	
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

These cases were tried before the Court without a jury, the Honorable James M. Fitzgerald presiding. The issues have been tried or heard and a decision has been rendered. Defendant Aviones De Sonora, S.A. has been served with the complaints, has failed to respond to the complaints, and default has been entered against it.

IT IS ORDERED AND ADJUDGED that damages are awarded against defendant Exportadora De Sal, S.A. De C.V., and against defendant Aviones

De Sonora, S.A., jointly and severally, and in favor of plaintiffs as follows:

1. In favor of plaintiff Hiroko Sugimoto for $617,779.00, less an offset of $40,329.07, in the amount of $577,449.93;

2. In favor of plaintiff Kimiko Kodani for $1,093,489.00, less an offset of $40,329.07, in the amount of $1,053,159.53;

3. In favor of plaintiff Kuniko Omachi for $2,066,472.00, less an offset of $40,329.07, in the amount of $2,026,142.93.

4. In favor of plaintiffs Hiroko Sugimoto, Kimiko Kodani, Kuniko Omachi, Mayumi Nukiwa, and Eri Omachi for costs.

Enter the judgment.

Dated this 5 day of May, 1993, at Anchorage, Alaska.

/s/
JAMES M FITZGERALD
United states District Judge

U.S.DEPARTMENT OF COMMERCE

[Exhibit 12-6, excerpt.]

Washington, October 27, *19* 92

I HEREBY CERTIFY that the annexed is a true copy of Terminal Forecasts (FTs) and FT Amendments for Mexico, valid during the periods beginning 0600Z and 1800Z September 28, 0600Z and 1800Z September 29, and 0600Z and 1800Z September 30, 1987; and hourly and special weather reports for Mexico, during the period from 0000Z September 28, to 2359Z September 30, 1987, inclusive

on file in the Aviation Services Branch, National Weather Service Headquarters, Silver Spring, Maryland

Robert Kuessner
Aviation Safety and Evaluations Program Leader
National Weather Service
(Official Title)

I HEREBY CERTIFY that Robert Kuessner *who signed the foregoing certificate, is now, and was at the time of signing,* Aviation Safety and Evaluations Program Leader *and that full faith and credit should be given his certificate as such.*

In WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 27th *day of* October, *one thousand nine hundred and* ninety-two.
For the SECRETARY OF COMMERCE:

J.Marilee Bright
Chief, Executive Affairs
National Weather Service
Certifying Officer

*** SRRS PRODUCT RETRIEVAL ***
FOR
09/30/87 0000 UTC TO 09/30/87 2359 UTC

FTMZ2 MMMX 300500
TIJ 300606 15MNU 4HK TEMPO C15NUB. 11Z 10MNU 4FH TEMPO C10NUB 2FH. 15Z DSP 5HK 2410. 19Z DSP 2512 . .
MXL 300606 260MNU. 17Z 260MNU 2410. 04Z DSP . .
HMO 300606 DSP. 17Z DSP 2312. 03Z DSP . .
GYM 300606 DSP. 17Z DSP 2312. 03Z DSP . .
CEN 300606 DSP. 17Z DSP 1810 OCNL 30MNU. 03Z DSP . .
LTO 300606 DSP. 17Z DSP 1210. 03Z DSP . .
MMO MEX GN . .
FTMX2 MMMX 301700
TIJ 301818 DSP 3010.03Z DSP 3HK OCNL 12MNU.08Z C3X 1/2F.16Z 5MNU 3H . . .
MXL 301818 40MNU 0410.03Z DSP . . .
HMO 401818 DSP 1610 OCNL 20/23Z 30MNU.04Z DSP. . .
GYM 301818 DSP 2010 OCNL 30MNU.21Z 30MNU 2015 OCNL C30NUB. OCNL 23/04Z 5T.06Z DSP . .
CEN 301818 DSP 2010 OCNL 30MNU.21Z 30MNU 2015 OCNL 00/06Z 5T.08Z 100MNU C200NUB . .
LTO 301818 25MNU 10909MNU C200NUB 1210 TEMPO 23/04Z C15NUB OCNL 5T . . .
06Z 25MNU C9NUB 200NUB . .
MMO/MEX/RS.
FTMX2 MMMX 301430
TIJ AMD1 300606 1430Z C9X 0X TEMPO 1X.15Z C5X 1/2F.16Z 5MNU 3HK.18Z DSP 3101. 03Z DSP 3HK OCNL 12MNU . .
MMO/MEX/RS.
FTMX2 MMMX 302130
LTO AMD1 301818 2130Z DSP 0810 OCNL 25MNU.23Z 25MNU 200MNU 1210.

04Z DSP.10Z 100MNU C200NUB 1210 OCNL
DSPS 16Z 20MNU . .

[Emphasis added.]

[Exhibit 12-1, excerpt.]

U.S.DEPARTMENT OF COMMERCE

Washington, December 18 , *19* 92

I HEREBY CERTIFY that the annexed is a true copy of Aviation Area Forecasts (FAs) for the Pacific Coast Area prepared by the National Severe Storms Forecast Center at Kansas City, Missouri, valid during the periods beginning 0245Z and 1045Z September 30, 1987; Terminal Forecasts (FTs) and FT Amendments for San Diego, California, prepared by the Los Angeles, California, Forecast Office valid during the periods beginning 0200Z, 1000Z, and 1900Z September 28, 29, and 30, 1987; and hourly and special weather reports for San Diego (Brown Field), during the period from 0000Z to 2359Z September 30, 1987, inclusive

on file in the Aviation Services Branch, National Weather Service Headquarters, Silver Spring, Maryland

Robert Kuessner
Aviation Safety and Evaluations Program Leader
National Weather Service
(Official Title)

I HEREBY CERTIFY that Robert Kuessner *who signed the foregoing certificate, is now, and was at the time of signing,* Aviation Safety and Evaluations Program Leader *and that full faith and credit should be given his certificate as such.*

In WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this

18th *day of* December, *one thousand nine hundred and* ninety-two.
For the SECRETARY OF COMMERCE:

J.Marilee Bright
Chief, Executive Affairs
National Weather Service
Certifying Officer

*** SRRS PRODUCT RETRIEVAL ***
FOR
09/30/87 0000 UTC TO 09/30/87 2359 UTC

TTAA00 KLAX 300138
SAN FT 300202 CLR 3008. 08Z CLR 6H OCNL C8 BKN 4F. 16Z -X 4H. 20Z VFR . .
TTAA00 KLAX 300244
SAN FT 300202 CLR 3008. 08Z CLR 6H OCNL C8 BKN 4F. 16Z -X 4H 20Z VFR . .
TTAA00 KLAX 300821 AMD
SAN FT AMD 1 300802 0820Z -X C2 BKN 2F OCNL -X 4F. 18Z 120 SCT 250 SCT 3010. 20Z VFR NO CIG. .
TTAA00 KLAX 300933
SAN FT 301010 C2 X 1/2F OCNL -X C2 BKN 2F. 18Z 120 SCT 250 SCT 3010. 04Z VFR. 08Z MVFR F . .
TTAA00 KLAX 301518 AMD
SAN FT AMD 1 301510 1520Z C5 OVC 11/2F OCNL-X 7 SCT 3FH. 18Z 120 SCT 3010 VSBY 5H TIL 20Z. 04Z VFR. 08Z MVFR F . .
TTAA00 KLAX 301834
SAN FT 301919 120 SCT WND 3010 TIL 02Z. 08Z -X 3 SCT 120 SCT 4FH OCNL C3 X 1/2F AFT 10Z. 13Z LIFR CIG F. 17Z MVFR H . .

[Emphasis added.]

JEPPESEN JUL 31-87 (11-1)

TIJUANA, MEXICO

GEN ABELARDO L RODRIGUEZ INTL

ILS DME Rwy 09

LOC 111.5 ITIJ

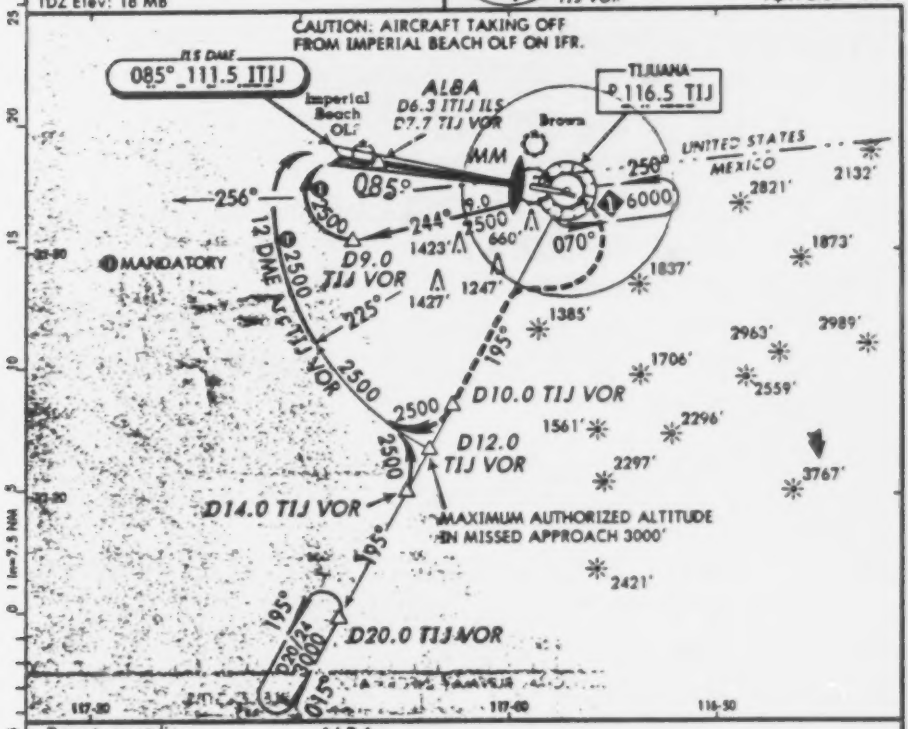
Apt. Elev 499'

•TIJUANA Approach (R) Below 20,000' 119.5
20,000' & Above 120.3
•TIJUANA Tower 118.1

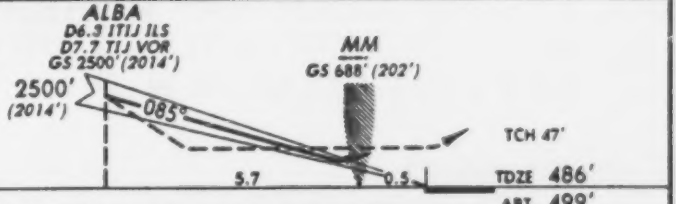
Alt Set: MB (IN on req)
TDZ Elev: 18 MB

070° 250° 3400' 5200' MSA TIJ VOR

CAUTION: AIRCRAFT TAKING OFF FROM IMPERIAL BEACH OLF ON IFR.



Do not use radio altimeter due to orographic conditions.



MISSED APPROACH: Climb to 1500', turn RIGHT and climb to intercept outbound TIJ VOR R-195, continue on R-195 to intercept the 12 DME ARC or hold between D20.0 and D24.0.

STRAIGHT-IN LANDING RWY 09	ILS	LOC (GS out)	CIRCLE-TO-LAND
	DH 736' (250') ALS out	DH 786' (300') MM out	MDA 840' (354')	MDA
A	RVR 1200m or ¾	RVR 1200m or ¾	RVR 1600m or 1	A 1200' (701')-1
B				B
C				C 1200' (701')-2
D		RVR 1600m or 1		D 1200' (701')-2¼
A-B-C-D	DH 786' (300') RVR 1600m or	DH 836' (350') RVR 1600m or	RVR 2000m or 1¼	

Gnd speed-Kts	70	90	100	120	140	160
GS 3.00°	379	487	541	649	757	866
ALBA to MAP 6.2	5:19	4:08	3:43	3:06	2:39	2:20

CHANGES: See other side.

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TIJUANA, MEXICO MMTJ (11-1) JUL 31-87 JEPPESEN

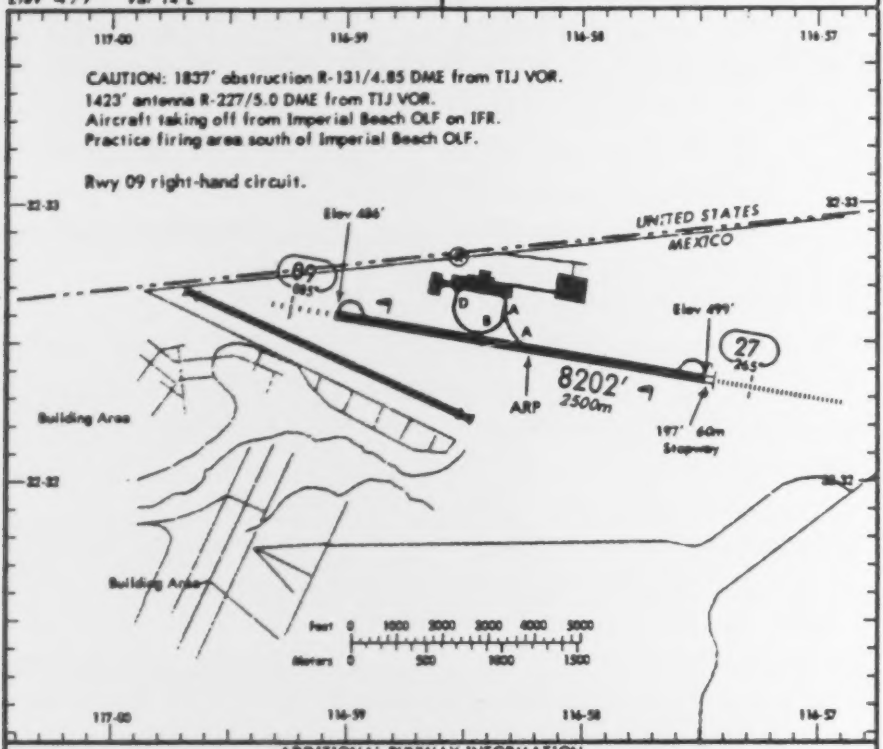
GEN ABELARDO L RODRIGUEZ INTL

N32 32.5 W116 58.3

Elev 499' Var 14°E

•TIJUANA Clearance 122.1

•Tower 118.1



ADDITIONAL RUNWAY INFORMATION

RWY						USABLE LENGTHS — LANDING BEYOND — Threshold	Glide Slope	TAKE-OFF	WIDTH
09	HIRL	MALS	❶ AVASI-L	RVR					144' 44m
27	HIRL	ALSF-I	❷ AVASI-L						

❶ Upwind angle 3.5°, downwind angle 3.0°.

❷ Use only within 5 NM, upwind angle 3.5°, downwind angle 3.0°.

TAKE-OFF & DEPARTURE PROCEDURE

	Rwy 27	Rwy 09
1 & 2 Eng	200-½	1600-2
3 & 4 Eng		

FOR FILING AS ALTERNATE

	Precision	Non-Precision
A	600-2	1600-3
B		
C		
D		

DEPARTURE PROCEDURE: Rwy 09, (Restricted to 200 Kt IAS Max). Climb on runway heading crossing D3.0 at 1800' or above, then intercept TIJ VOR R-250, at D8.0 teardrop turn to the LEFT to TIJ VOR to MCA for departing the station.

NOTE: This procedure requires a minimum climb gradient of 385' per NM until reaching 2100'. Rwy 27; intercept TIJ VOR R-250 and proceed with teardrop turn to the LEFT within 10 NM to the MCA for departing the station. CAUTION: Aircraft taking off from Imperial Beach OLF on IFR. Practice firing area south of Imperial Beach OLF. Departure MCAs: V-5 to MXL, J-3 & V-3 to PPE, J-5 to HMO 5000'; J-1 & V-99 to SQN 4100'; J-1 to MZB 3700'.

CHANGES: Rwy 27 take-off visibility, V-59 MCA added.

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[Exhibit 33]

SAN DIEGO POLICE DEPARTMENT
INVESTIGATOR'S REPORT

DATE (occurr.): September 30, 1987
TIME (occurr.): 0756 Hours
LOCATION: Otay Mesa "The Soccer Field"
SUBJECT: Aircraft Accident

On Wednesday, September 30, 1987, a Cessna 340 with Mexican Registration XS-KOA was on an ILS approach to the Tijuana International Airport. The aircraft was enroute to Tijuana from Guerrero Negro, Baja California, Mexico with six (6) persons on board. At 0756 hours, the Tijuana Tower lost radar and radio contact with the aircraft approximately one and a-half (1.5) miles west of the airport. Tower controllers notified United States authorities and the United States Border Patrol began a search of the area. At approximately 0816 hours, the Border Patrol located the wreckage in an area one and a-half (1.5) miles from the runway and one hundred (100) yards north of the International Border on a hillside just above the area known as "The Soccer Field". All six (6) passengers were dead.

Brown Tower, the nearest F.A.A. facility, reported the following weather conditions:

0748 -X 70 SCT 130 SCT 3/4F
0825 SPCL WOX 1/16 F

The aircraft is owned by Aero Servicios de Sonora, Hermosillo, Baja California, Mexico.

The pilot was Captain Raul GUADALUPE GUTIERREZ TELLEZ. He had a Mexican pilot certificate, number 734, with a commercial multi-engine instrument rating. His

medical certificate will expire December of 1987.

The passengers were three (3) Japanese businessmen and two (2) Americans:

1. Dr. Katsuo SUGIMOTO	About Fifty-five (55) Years,
2. Dr. Yoshihito KODANI	Sixty-five (65) Years,
3. Mr. Hideo OMACHI	Forty-one (41) Years,
4. Mr. Manuel HERNANDEZ	Fifty-one (51) Years, Oakland, California,
5. Mr. Ramon SCHOENBERG	Fifty-nine (59) Years, Oakland, California.

Initial indications were the plane was attempting to execute an approach in dense fog. The aircraft appeared to have impacted the terrain on its left underside before losing its left wing and lower left fuselage. After striking the ground, the aircraft appeared to have cartwheeled, throwing the four (4) rear passengers from the aircraft and scattering debris over a hundred (100) yard area. The aircraft was a total loss.

Additional personnel at the scene:

1. Mr. Dan MATTICKS, Deputy Coroner
2. Mr. Scott C. CROSIER, Aviation Safety Inspector, San Diego F.S.D.O.,
3. MR. David A. MARTINEZ, Airport Comandante, Tijuana International Airport
4. Mr. David F. CASILLAS, Office of Director General of Civil Aeronautics, Tijuana International Airport, and
5. Mr. Jim WALLACE, N.T.S.B. (LAX).

153 test. LA. 1938, 119

Reporting Officer L. R. ANDERSON I.D.# 3308
Division Traffic Approved By _____
Date of this report _____ Time ____ Hours

[Exhibit 24, excerpt.]

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

CERTIFICATE OF TRUE COPY

I HEREBY CERTIFY that the attached is a true copy of the original on file in the Operations and Facilities Division, National Transportation Safety Board, which original comprises the material available from the NTSB public reference file concerning the aviation accident at San Diego, California, on September 30, 1987, involving, NXAKOA, and that I have legal custody of the records involved.

Signed and dated at Washington, D.C.
this 19th day of January 19 90
by Cathleen Gilchrist
(Signature)
Record Management Officer
(Title)

****

I HEREBY CERTIFY that Cathleen Gilchrist who signed the foregoing certificate is now, and was, at the time of signing the Records Management Officer, public Inquiries Section, Operations and Facilities Division, National Transportation Safety Board, that she has legal custody of the record involved, and that full faith and credit should be given her certificate as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the National

Transportation Safety Board to be
affixed this 19th day of January 19 90

William N. Park
(Signature)
Chief, Operations and Facilities Division
(Title)

National Transportation Safety Board

NTSB Form 1320.17 (Rev. 6/80)

National Transportation Safety Board ACCIDENT FILE CONTENTS	PAGE 1 OF 1 PAGES
Transportation Mode X AVIATION __ HIGHWAY __ PIPELINE _ INTERMODAI __ MARINE _RAILROAD	NTSB FILE NO

IDENTIFICATION OF ACCIDENT
SAN DIEGO, CALIFORNIA
SEPTEMBER 30
CESSNA 340A, XA-KOA
LAX-87-F-A350

Item No	DESCRIPTION OF ITEM	No of Pages	
		Doc	Color Photo
1.	Accident File Contents, NTSB Form 6120.3	1	
2.	Factual Report Aviation Accident/Incident, NTSB Form 6120.4	14	
	Supplement A	2	
	Supplement B	4	
	Supplement F	1	
	Supplement K - Mr. Raul G. Tellez	5	
	Supplement K - Mr. Manuel Hernandez	5	
	Supplement K - Mr. Yoshihito Kodani	5	
	Supplement K - Mr. Katsuo Sugimoto	5	
	Supplement K - Mr. Hideo Omachi	5	
	Supplement K - Mr. Ramon Schoenberg	5	
	Supplement Q	3	
	Supplement R	2	
	Supplement S	1	
	Supplement U	4	
3.	San Diego Department Report	2	
4.	Requested Data from Comandancia del Aeropuerto de Tijuana, BC, Mexico	4	
5.	Sunrise Information	1	

	Statement of Representative of Party to NTSB Investigation	1	
	Toxicology Report, Mr. Raul G. Tellez	2	
	15 Photographs w/Negatives		8
	TOTAL NUMBER OF PAGES	72	8

NTSB Form 6120.3 (Rev 1076)

NATIONAL TRANSPORTATION
SAFETY BOARD

FACTUAL REPORT
AVIATION
ACCIDENT/INCIDENT

LAX 87-F-A-350

National Transportation Safety Board
Washington, D.C. 20594

NTSB Form 6120.4 (Rev 1-84)

Instructions

Unless otherwise stated in the instructions or on the form, all data fields must be completed. Each data field requires either a direct entry or the entry of one or more x's in appropriate blocks that best describe the mishap circumstances. Multiple entry fields may require two or more responses. Enter all applicable responses in multiple entry fields. When the selections offered are inappropriate, a two digit "other" code shall be entered in the space that follows the word "other." Do not make additional remarks in the margins as the automated data processor is not programmed to accept them. Any information which is needed to outline the sequence of events which preceded the occurrence, to support probable cause determination or which is pertinent to crashworthiness studies should be addressed in the narrative report.

"Other" Codes

01 Limited access to and/or limited time available at site.
02 Aircraft not recovered/missing.
03 Part/component not recovered/not located.
04 Aircraft too badly damaged to determine.
05 Part/component too badly damaged to determine.
06 Information not pertinent to accident/incident.
07 Applicable personnel could not provide information or information not available to applicable personnel.
08 Applicable personnel would not provide information.
09 Not installed.
10 Records not located/not available.
11 Information not entered on NTSB Form 6120.1.
12 See narrative report.

Supplements

The following accident scenarios are provided to assist investigators in selecting the report forms which should supplement the basic NTSB Form 6120.4.

1. A Cessna 172 collided with a snowbank during landing go around at an airport. Weather was not a factor. The pilot said there was no powerplant or control malfunction. The pilot and one passenger received minor injuries. The pilot had recently been certificated as a private pilot.

Complete supplemental forms F (Training and Proficiency), Q (Airport) and S (Occupant list). A "Limited" investigation should be completed.

2. A PA-31, being operated by two pilots under FAR 135, crashed into a tower while being vectored to intercept the localizer at the destination airport. The PA-31 struck the tower while being operated at an assigned altitude. Flight was in IMC. There were two fatal injuries and three serious injuries. CFR personnel responded and treated the injured.

This accident requires an onscene investigation. Thus supplement A (Wreckage documentation), B (cockpit documentation) and I (Crash kinematics) are required. Supplements F (Second pilot), F (Training and Proficiency) and U are required because of the two pilot FAR 135 operation (even though proficiency may not be at issue). S is needed to list the occupants; T, to document the CFR activity and P, to cover the possible ATC involvement. R (Meteorology) is required to document the weather conditions. Copies of supplements K and L would be required to document injury/toxicology and seat/restraint damage information, respectively.

National Transportation Safety Board FACTUAL REPORT AVIATION	1 NTSB Accident/Incident No. LAX87FA350			
	2 1 _x_ Accident 2 __ Incident	3 Investigation 1 _x_ NTSB 2 __ FAA Delegated		
4 Aircraft Registration No XA-KOA	5 Flight No A Other 06	*For collision between aircraft enter reg. no. and flt. no. for other aircraft*	6 Aircraft Registration No	7 Flight No A Other 06
8 Nearest City/Place San Diego	9 State CA	10 Zip Code (First 5 numbers only) 92138	11 Accident Site Elevation _389_ Feet MSL	

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident

HISTORY OF FLIGHT

On September 30, 1987, at 0759 hours[1/], a Cessna 340A, XA-KOA, operated by Aero Servicio de Sonora, collided with the terrain near General Abelaro L. Rodriguez Int'l Airport, Tijuana, Mexico. The accident occurred within the United States, near San Diego, California and approximately 100 yards north of the International Border.

The Aircraft was on a commercial, non-scheduled, domestic, passenger flight, at the time of the accident.

Instrument meteorological conditions prevailed at the

time and an instrument flight plan was filed. The aircraft was destroyed by impact forces and the certificated commercial pilot and his five passengers were fatally injured.

The flight originated at Guerrero Negro, Mexico on September 30, 1987, at approximately 0600 hours[1/].

[1/] All times are Pacific Daylight Time based on the 24 hour clock.

Additional Persons Participating in this Accident/Incident Investigation (Name, address, affiliation. Continue on page 2 if necessary)

WILLIAM S. ROSS, CESSNA AIRCRAFT COMPANY, WICHITA, KS 67277
MICHAEL J. GRIMES, CONTINENTAL MOTORS, MOBILE, AL 33601
LARRY STEWART, FAA, SAN DIEGO, CA FSDO

Investigated By:

17 Date (Nos. for M.D.Y)	18 Agency	19 Name/Signature
3/10/89	NTSB	JAMES A. WALL

National Transportation Safety Board	NTSB Accident/Incident Number
FACTUAL REPORT AVIATION	LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

Upon arriving in the Tijuana area, Mexican air traffic

controllers provided the pilot with current weather conditions and cleared the aircraft for an ILS approach to runway 09.

After flying the 12 mile DME arc southwest of the Tijuana VOR for alignment with the localizer, the aircraft was cleared for the approach. American controllers, who visually monitor aircraft in their airspace during this approach, stated that they saw nothing unusual.

The pilot reported his altitude as 1200 feet mean sea level (MSL) over "ALBA", the final approach fix to controllers at General Rodriguez airport. Shortly thereafter the controllers lost radar and radio contact with the aircraft before it reached the middle marker. The marker is located .5 miles from the approach end of the runway 09.

The aircraft's wreckage was found at approximately 0816 hours[1/] on September 30, 1987 by United States Border Patrol personnel. It was located approximately one mile west of General Rodriguez Airport.

METEOROLOGICAL

The weather at General Rodriguez Airport was reported as:

0715 hours[1/]; sky partially obscured, visibility 1 mile in fog, haze and smoke, temperature/dew point missing, wind calm, altimeter 29.96 inches Hg.

0800 Hours[1/]; sky partially obscured, visibility 1/10 mile in fog and haze, temperature 63 degrees, dewpoint 63 degrees Fahrenheit, wind from 240 degrees at 4 knots, altimeter 29.97 inches Hg.

The weather at Brown Field, San Diego, California, located about one mile north of the accident site was reported as:

0800 hours[1/]; sky partially obscured, visibility 3/4 mile in fog and haze, temperature 64 degrees, dew point 62 degrees fahrenheit, wind from 280 degrees at 4 knots, altimeter 29.96 inches Hg.

Two pilot weather reports (PIREP) of the fog/cloud tops were received by air traffic controllers at Lindbergh Field, San Diego,California. Lindbergh is located approximately 15 nautical miles, west-northwest of the accident site.

At 0700 hours[1/]; fog/cloud tops were reported at 900 feet.

At 0800 hours[1/]; fog/cloud tops were reported at 1,200 feet.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

National Transportation Safety Board FACTUAL REPORT AVIATION	NTSB Accident/Incident Number LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

The sun's altitude above the horizon, as viewed from General Rodriguez Airport, was calculated without correction for non-level horizons. The calculations at

0755 hours[1/] depicts the sun at 15 degrees above the horizon and on a magnetic azimuth of 89.1 degrees from the airport. At 0800 hours[1/] the sun was at 16 degrees above the horizon and on a magnetic azimuth of 89.8 degrees from the airport.

AIDS TO NAVIGATION

The Commandant of General Rodriguez Airport reported that there were no failures or malfunctions in the ILS, DME, or radar systems noted prior to or at the time of the accident.

COMMUNICATIONS

A cassette tape recording of the pilot/controller conversation was made available to The Board by the Commandant of General Rodriguez Airport. After a transcription was made of the conversations the tape was returned to the Commandant.

The audio information on the tape was distorted but did provide the following:

____ = unintelligible words.

pilot: attention ____ ____ ____ tijuana ____ ____ ____

atc: go ahead

pilot: ____ ____ ____ ____ cessna 340 flying from guerrero negro
to tijuana destination tijuana about 50 miles on the 144 radial with 12 thousand ____ desire tijuana weather.

atc: certainly sir wind calm altimeter 29.94 no temperature ____ ____ ____ ____ ____ ____ ____ ____

pilot: i'll have to go to mexicali

atc: no
pilot: ensenada is also closed
atc: ____ ____ ____ ____
pilot: ____ ____ ____ ____

WRECKAGE

The aircraft impacted the ground into a 37 degree up-sloping ridge in a level pitch and roll attitude. The aircraft' impact heading was 085 degrees. The elevation of the point of ground impact was approximately 389 feet. The silhouette of the aircraft was imprinted in the loose dirt at the point of ground impact.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

National Transportation Safety Board	NTSB Accident/Incident Number
FACTUAL REPORT AVIATION	LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

After impacting the ground the wreckage tumbled over a ridge, on a magnetic heading of 120 degrees. The wreckage continued its tumbling up another hill before coming to a rest on its left side. The empennage separated from the cabin section during the ground impact sequence.

A section of the skin from the left main wing tip fuel tank displayed evidence of compression bending and was imbedded in the ground at the point of initial impact.

The right main fuel pump armature was torn from its housing and imbedded in the hole made at ground impact. The armature displayed evidence of rub around its circumference.

ENGINES

The left engine was attached to the nacelle and twisted to an inverted position. There were six chrome cylinders attached to the case and the mixture control in the fuel injector was in the idle cut-off position. The turbocharger was detached from the engine and the impeller blades were seized against the housing.

The right engine separated from the airframe. It had six chrome cylinders attached and was located about 100 feet below the main wreckage. The fuel injector throttle valve was jammed in the center of travel. The right magneto was broken from the accessory

case. The alternator was torn from the crankcase and the crankcase was fractured.

PROPELLERS

The left propeller separated from the engine and the engine and the propeller blades separated from the hub. The blades were deeply gouged on the leading edges and exhibited cordwise scratches across the face of the blades.

The right propeller separated from the engine crankshaft and was located about 87 feet beyond the point of initial ground impact. One of the blade tips separated from the blade and one blade displayed evidence of forward blade curl. The blades displayed cordwise scratched across the face and deep gouges along the leading edges.

MEDICAL AND PATHOLOGICAL

A Pathological examination of the pilot by Dr. David M. Katsuyama of the San Diego County Coroner's Office did not disclose any evidence of a preexisting physical condition that would have detracted from his ability to operate the aircraft.

Toxicological tests of the pilot were conducted for drugs and alcohol. A blood caffeine level of less than 1MCG/ML and a blood ethanol level of 72MG/DL (0.07 percent) was detected.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

National Transportation Safety Board FACTUAL REPORT AVIATION	NTSB Accident/Incident Number LAX87FA350

16 Narrative Statement of Facts, Conditions and Circumstances Pertinent to the Accident/Incident (Continued)

ADDITIONAL INFORMATION

The Safety Board did not take possession of the wreckage due to the non-availability of guards. The wreckage was guarded by U.S. Border Patrol personnel during the daylight hours on September 30 and October 1, 1987. The Commandant of General Rodriguez International Airport was asked to advise the operator, who was at the airport, that the investigators and guards would leave the accident site at 1400 hours[1/] on October 1, 1987.

Attach additional pages as necessary (Page 2a, 2b, 2c, etc.)

NTSB Form 6120.4 (Rev. 1-84) Page 2 ___

* * * *

[Remainder of Report Omitted.]

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[Filed Feb. 1, 1989]

[Exhibit 72-3]

Attorneys for Defendant,
EXPORTADORA DE SAL, S.A. DE C.V.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al., Plaintiffs, v. EXPORTADORA DE SAL, S.A. DE C.V., et al., Defendants.	Civil No. 88-1532-JLI(IEG) DECLARATION OF MANUEL GUZMAN IN SUPPORT OF MOTIONS TO DISMISS, FOR SUMMARY JUDGMENT, AND TO STRIKE Date: June 5, 1989 Time: 10:30 a.m. Place: Courtroom 8 The Honorable J. Lawrence Irving

MANUEL GUZMAN DECLARES:

1. I am the Coordinator of the San Diego Office of Exportadora de Sal, S.A. de C.V. ("Exportadora") and was the Manager of Purchasing and Traffic for Exportadora when

the subject aircraft collision happened. I personally visited the scene of the accident the day it occurred and am familiar with the preceding events. A copy of the National Transportation Safety Board's Preliminary Report regarding the accident is attached as Exhibit "A".

2. Exportadora is a Mexican corporation. A majority of its stock is owned by the Government of Mexico, the remainder by a Japanese corporation. Exportadora's only business is the production and exportation of salt, which it does through its sole production facility in Guerrero Negro, Baja California, Mexico. The salt is produced through a solar evaporation process that involves pumping sea water into a series of evaporation ponds.

3. Exportadora maintains an office in San Diego which is used primarily for purchasing equipment and parts needed to operate the facility in Guerrero Negro. The office's only other function is the coordination of salt shipments from Guerrero Negro to purchasers, and administration of accounts receivable in local banks. Exportadora has no other offices or facilities.

4. Since about 1983, members of Tottori University in Japan have been doing an agricultural experiment on a small piece of Exportadora's land next to the salt production facility. The experiment has been done with the cooperation of two branches of the Mexican Government: the Department of Agriculture and Water Reclamation (Secretaria de Agricultura y Recursos Hidraulicos), and the National Institute of Agricultural Research (Instituto Nacional de Investigaciones Agricolas). Although Exportadora has no involvement in the experiment, it has been encouraged by the Government of Mexico to assist the Japanese as a courtesy to its co-stockholder in Exportadora and Tottori University. Members of the University have also asked Exportadora to assist them in their dealings with the Mexican Government. A copy of an early letter from the University to Exportadora is attached as Exhibit "B".

5. Because transportation to Guerrero Negro is not regular, Exportadora has been asked occasionally to provide

transportation for the Japanese either to or from Guerrero Negro. This only happens about once a year because the experiment is monitored by just two Japanese. When asked, Exportadora generally provides free air transportation on its sole company-owned aircraft. The plane, when available, makes regular but unscheduled flights between Tijuana and Guerrero Negro. On other occasions, the Japanese are allowed to ride on any trucks or other vehicles, or infrequently on any planes that Exportadora might have chartered, making trips between Guerrero Negro and Tijuana.

6. To the best of my knowledge and information, two of the passengers on the September 30, 1987 flight that crashed, were members of Tottori University -- Dr. Sugimoto and Dr. Kodani. They were not like the usual members and did not stay for the normal one to two years, or like the supervisor who generally visited once a year for about two months. Instead, they spent about a week for an unknown purpose.

7. The other Japanese passenger on the September 30 flight was a Mr. Omachi. Based on our information, he had flown to Guerrero Negro from Mexico City and Exportadora had been asked to arrange transportation for him to Tijuana.

8. The two other passengers on the flight were technicians from Berkeley Pump Corporation in California. They were in Guerrero Negro on a sales call to solicit Berkeley's latest pumps to Exportadora. Berkeley Pump's representatives had made similar trips to Guerrero Negro about once a year.

9. On September 29, 1987 when the Japanese and the Berkeley technicians were ready to return to Tijuana, Exportadora's company plane was not available in Guerrero Negro. As alternate transportation, Exportadora chartered a plane from Aviones de Sonora ("Aviones") to make a round trip from Sonora to Guerrero Negro to Tijuana and back. During that time period, Exportadora chartered aircraft from Aviones about five times a year and paid a fixed sum for the

round trip.

10. Until the September 1987 accident, Exportadora had used Aviones' services without incident. No accidents, near accidents, or equipment failures ever occurred.

11. The day of the collision, Exportadora paid for the chartered flight without reimbursement from the passengers. It was by then accepted practice for the Japanese to provide their own transportation to and from Japan, and for Exportadora to provide transportation to and from Guerrero Negro. Exportadora and Berkeley Pump had a similar practice. Exportadora would arrange air transportation within Mexico and Berkeley Pump would arrange it within California.

12. Other than chartering the aircraft, Exportadora had no control of the flight. It did not employ the pilot, own the aircraft or hold any interest in Aviones.

13. The claim in this lawsuit that Exportadora and Aviones had "entered a joint venture or other similar relationship" different than that of any other customer. We purchased air transportation.

14. Exportadora has never provided maintenance service for any of Aviones' aircraft either, nor does it service its own company plane.

15. We, at Exportadora, were deeply saddened by the September 1987 accident; however, we cannot accept any responsibility. Whatever happened as the plane was attempting to land at the Tijuana airport, Exportadora had no control.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on February 15, 1989 at San Diego, California.

/S/
Manuel Guzman

[Emphasis added.]

National Transportation Safety Board PRELIMINARY REPORT AVIATION					NTSB Accident/Incident Number LAX87FA350 Investigation By NTSB
1 Accident	4 I.C.A.O. Preliminary Report Submitted (NTSB only) Yes				5 Report Status Preliminary Report
Location/Date					
6 Nearest City/Place San Diego	7 State CA	8 Zip Code (First 5 Nos.) 92138	9 Date (Nos.for M,D,Y) 9/30/87	10 Local time (24 hour clock) 0759	11 Time Zone PDT
Aircraft Information					
12 Registration No. XAKOA		13 Aircraft Manufacturer CESSNA			14 Model/Series No. 340A
15 Type of Aircraft Airplane					16 Home built No
Accident Information					
20 Aircraft Damage Destroyed	21 Property Damage (Multiple entry) None	22 Accident/ incident Phase of Operation Approach	23 Injury Index (Most critical injury) Final		
Injury Summary	24 Fatal 6	25 Serious	26 Minor	27 None	

Crew	Injury Code	Passenger	Injury Code
Tellez, Raul G. HEMOSILLIO, OF	4	SUGIMOTO, DR.	4
		KODANI, DR.	4
		OMACHI, MR.	4

		HERNANDEZ, MANUEL	4
		SCHOENBERG, RAMON	4

Injury codes None--1 Minor--2 Serious--3 Fatal--4

Operator Information

42 Name	46 City	47 State
AERO SERVICIO DE SONORA	HEMOSILLIO, MX	OF

Type of Certificate(s) Held

50 Air Carrier Operating Certificate
On-demand air taxi

Regulation Flight Conducted Under

53
A Specify MEX FLT RULE

PRELIMINARY INFORMATION - SUBJECT TO CHANGE

NTSB Form 6120.19A (1-84) Page 1
This form supersedes NTSB Form 6120.19 (Rev.1-83)

National Transportation Safety Board PRELIMINARY REPORT AVIATION ACCIDENT/INCIDENT	NTSB Accident/Incident Number LAX87FA350

Type of flight Operation conducted

(Complete 54, 55, 56. Only if flight was a revenue operation conducted under 121, 125, 127, 129, 135)

Flight Plan/Itinerary

58 Flight Plan filed IFR

59 Itinerary-Last Departure Point	60 State	62 Destination	63 State	64 Airport I.D.
GUERRERO NEGRO	MX	TIJUANA	MX	MMTJ

Weather Information

65 Source	67 Sky/Lowest Cloud Condition	68 Lowest Ceiling	69 visibility (decimals)
Weather Observation Facility	Partial obscuration	None	0.75 SM
66 Time of Weather Observation			70 Temperature
0800 (local)			64 Fahr.
			71 Dew Point
			62 Fahr.

72 Wind Direction	73 Wind Speed	75 Altimeter	76 Weather Conditions (at accident site)	77 Precipitation
280 Degrees (Meg.)	4 Kts.	29.96 Hg	IMC	No

Narrative

78 (Brief resume of facts. The information shall not contain opinion, conjecture, or statements reflecting on the character or integrity of the persons involved.)

On September 30, 1987, at 0759 hours PDT, a Cessna 340A, XAKOA, operated by Aero Servicio de Sonora, collided with the terrain, approximately 1 mile from the approach end of Runway 09, at General Abelaro L. Rodriguez Int'l Airport, Tijuana, Mexico, while on a non-scheduled domestic passenger flight. Instrument meteorological conditions existed at the time and an IFR flight plan was filed. The aircraft was destroyed by impact forces and the certificated commercial, instrument rated, Mexican pilot and his 5 passengers received fatal injuries. The flight originated at Guerrero Negro, Mexico, on September 30, 1987, at approximately 0620 hours PDT.

*****

(Please continue to next page.)

PRELIMINARY INFORMATION - SUBJECT TO CHANGE

National Transportation Safety Board PRELIMINARY REPORT AVIATION ACCIDENT/INCIDENT	NTSB Accident/Incident Number LAX87FA350

Narrative (continued)

The pilot reported at 1200 feet MSL over "ALBA", final approach point for the ILS-DME approach to Runway 09. The approach plate shows that the glide slope is to be intercepted at 2500 feet at "ALBA".

There were 2 PIREPs of cloud tops reported to Lindbergh Field, which is located approximately 12 nautical miles west northwest of the accident site. The cloud tops at 0700 hours PDT were reported at 900 feet MSL. At 0900 hours PDT the cloud tops were reported at 1200 feet MSL.

The aircraft impacted into a 37 degree upslope, while in level flight and appeared to be tracking the localizer approximately 1 nautical mile short of the runway. The elevation of the ground impact point was 350 feet MSL or 118 feet below the touchdown zone elevation of 468 feet. The aircraft, at this distance from the runway should have been approximately 436 feet above the elevation of the touchdown zone. The published decision height for this approach is 786 feet MSL or 300 feet above the elevation of the touchdown zone.

The commandante at General Rodriguez Airport reported the localizer, DME and glide slope were operational during the approach.

(Please continue to next page.)

Administrative Data

79 Notification From	80 Date(Nos.for M,D,Y)	81 Local Time(24 hour clock)	82 Time Zone
FAA, AWP COMM CENTER, L.A.	9/30/87	0910	PDT

83 FAA District Office/Coordinator
FSDO-9, LARRY STEWART, SAN

Investigator(s) Assigned

85 Investigator-in-Charge	86 Form Preparation Date(Nos.for M,D,Y)	87 Form Receipt Date(For NTSB use only)
James A Wall	10/6/87	10/6/87

PRELIMINARY INFORMATION - SUBJECT TO CHANGE

TOTTORI UNIVERSITY
1390 HAMASAKA, TOTTORI, 680 JAPAN
TELEPHONE: 0857-23-3411

1983. 2. 22

Dear Ing. F. Guzman Lazo

Thank you very much for your kind support for us.

We would like to start our agricultural experiment about cultivation of vegetables in the desert in Guerrero Negro.

Our experiment schedule is as follows:

1st period: Apr.1983 - Mar.1984 at Guerrero Negro
Apr.1984 - Mar.1985 in Japan to make report
2nd period: Apr.1985 - Mar.1986 at Guerrero Negro
Apr.1986 - Mar.1987 in Japan to make report

We will continue our experiment as 3rd period if necessary.

We would like to ask you to coordinate between, Secretaria de Agricultura y Recursos Hidraulicos (SARH), Instituto Nacional de Investigaciones Agricolas (INIA) and Tottori University in order to obtain the authorization from SARH. We understand that INIA has much interest about our experiments in Guerrero Negro.

We know that you are one of the most typical joint company with Mexican government and Japanese company, Mitsubishi Corporation, and you have the biggest salt field in the world in Guerrero Negro. We also understand very well that you are contributing to establish friendly relations between Mexico and Japan.

We hope that our agricultural experiment in Guerrero Negro will enable you to expect to get fresh vegetables there in near future and this experiment work will give Mexico new agricultural technology in the desert area.

This study in Guerrero Negro will also greatly contribute for promoting closer relationship between Mexico and Japan.

We will highly appreciate your kindness.

Yours truly,
/s/
Masao Toyama

Ing. F. Guzman Lazo
Director General
Exportadora De Sal. S.A. De C.V.

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John H. Stephens
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Attorneys for Defendant,
EXPORTADORA DE SAL, S.A. DE C.V.

[Filed May 26, 1989]

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG; MARTIN SCHOENBERG; TOMAS SCHOENBERG; DAN A. SCHOENBERG; ADRIANA SCHOENBERG; and BILL SCHOENBERG,	) Civil No. 88-1530 JLI(IEG)) DECLARATION OF MANUEL GUZMAN IN SUPPORT OF REPLY MEMORANDUM	
Plaintiffs,	) Date:	June 5, 1989
	) Time:	10:30 a.m.
	) Place:	Courtroom 8
v.	)	The Honorable J. Lawrence Irving
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation; AVIONES DE SONORA, S.A., a foreign corporation; UNITED MEXICAN AIRCRAFT	)	

CO., a foreign state;)
CESSNA AIRCRAFT)
CO., a corporation;)
TELEDYNE)
INDUSTRIES, INC.,)
a corporation,)
)
Defendants.)
_____)

MANUEL GUZMAN, declare:

1. I previously submitted a declaration in support of the motions of Exportadora de Sal, S.A. de C.V. ("Exportadora") to dismiss the complaints. I now submit this declaration to correct numerous inaccuracies contained in plaintiffs' opposition to the motions.

2. Exportadora's San Diego Office is not and never has been the principal place of business for the corporation. The corporate headquarters and administrative offices are in Guerrero Negro, Baja California Sur, Mexico. Exportadora's General Director, Mr. Juan I. Bremer is based there as are all officers of the corporation.

3. Because plaintiffs have raised questions about Mr. Bremer, I wish to clarify otherwise irrelevant facts that Mr. Bremer's family does maintain a house in San Diego where some of them attend college.

4. Exportadora's sole production facility is located in Guerrero Negro where it manufactures salt through a solar-evaporation process in an area covering more than 60,000 acres. The facility includes a warehouse where parts and equipment are stored, company housing, and a port to load barges.

5. Exportadora also operates a market which is stocked primarily with food imported from Tijuana and Ensenada, Mexico. The Mexican authorities do not allow Exportadora to ship food from the United states.

6. Vegetables grown at the experiment being

conducted on land adjacent to the facility are not purchased by Exportadora or sold through the market. The experiment has been conducted by members of the Tottori University in Japan with the cooperation of the Mexican Government. Exportadora is not involved other than providing assistance as requested by the Government of Mexico.

7. Some vegetables periodically are given away in Guerrero Negro; however, the amount is insignificant.

8. Exportadora's San Diego Office, only employs ten people. Of that, four live in Tijuana. We maintain limited office space and a warehouse that occupy a combined area of 13,000 square feet most of which is used to house parts and equipment in transit to Guerrero Negro.

9. No one in the San Diego Office makes policy or business decisions on behalf of Exportadora. All such decision are made in Guerrero Negro and those that must be executed in San Diego are handled by our office.

10. The responsibilities of the San Diego Office generally fall into two categories, communications and shipping/transportation. Until recently, our office has acted as the only conduit for communication with Guerrero Negro and those outside Mexico because direct communication was not possible. The San Diego Office, however, has had direct transmission capabilities through telex and teletype facilities. As of last year, phone lines have been available to Guerrero Negro.

11. The San Diego Office also relays shipping and transportation to and from Guerrero Negro. Again, this is done out of necessity because the airports in Tijuana and Guerrero Negro do not handle international flights. Passengers from outside Mexico generally must arrive in San Diego and depart Tijuana for Guerrero Negro, and then reverse the process when leaving Guerrero Negro.

12. Parts and equipment purchased form suppliers located outside Mexico go through a similar process because they cannot be shipped across the border without approval by both United states and Mexican Customs. That normally occurs in San Diego.

13. Salt produced by Exportadora is often transported to purchasers by Baja Bulk Carriers ("Baja Bulk"). Baja Bulk is a Liberian corporation and is not a wholly owned subsidiary of Exportadora. It is owned in equal parts by the Government of Mexico and Mitsubishi Corporation.

14. Because of its communication capabilities, the San Diego Office coordinates some of the salt shipments from Guerrero Negro to purchasers. The San Diego Office, however, does not sell any of Exportadora's salt as plaintiffs state.

15. When Mr. Schoenberg and Mr. Hernandez proposed their trip to Mexico, the request was transmitted through San Diego to Guerrero Negro. (Copies of certified translations of telexes sent to Guerrero Negro are attached as Exhibits A, B, and C.)

16. The decision to receive Mr. Schoenberg and Mr. Hernandez was made in Guerrero Negro by Mr. Bremer and relayed to us by telex for confirmation. (A copy of the certified translation of the telex is attached as Exhibit D.)

17. The decision to receive Mr. Sugimoto and Mr. Kodani was also made in Guerrero Negro. In that instance, the request was made directly to the attention of Mr. Hugo Martinez, Mr. Juan Bremer and Mr. I. Hina, all of whom were based in Guerrero Negro. (Mr. Martinez has since left Exportadora.) (Copies of the telexes received from Japan are attached as Exhibits E and F.)

18. The San Diego Office has no records indicating that the third Japanese passenger, Mr. Omachi, intended to visit our offices or that he contacted us before his trip.

19. When Mr. Schoenberg and Mr. Hernandez proposed their trip to Guerrero Negro, Exportadora thought they were employees of Berkeley Pump Company ("Berkeley Pump") which had supplied pumps and parts used in the salt production process. I was not aware until I read Mr. Bunce's declaration, filed on plaintiffs' behalf, that Mr. Schoenberg had left Berkeley Pump and started his own business. Mr. Schoenberg apparently was courting Exportadora for future business with his company, Prime Pump, with which

Exportadora had no existing business relationship.

20. I now believe that Mr. Hernandez also planned to leave Berkeley Pump and join Mr. Schoenberg in his new venture when he made the trip to Guerrero Negro. He had asked my assistant, Mrs. Carmen A. Chavez who often handled communications with Berkeley Pump, not to mention that he was making the trip because he planned to leave Berkeley Pump and had told them he would be on vacation. This was confirmed later by Berkeley Pump when Mrs. Chavez called to discuss the accident. they were particularly surprised because Mr. Hernandez was thought to be on vacation. I discussed the conversation with Mrs. Hernandez at the time but did not understand its significance until I read Mr. Bunce's declaration.

21. Since my deposition, I have tried to determine the flight plans for Exportadora's company plane on September 30, 1987, the day of the accident. Because weekly schedules are only kept for routine flights between Guerrero Negro and Tijuana, we generally have no records when non-routine flights are made. My information from talking to personnel in Guerrero Negro who schedule flights is that the company plane was required to make a trip to Mexico city that day.

22. Plaintiffs improperly use Exportadora's flight schedule to speculate that the company plane remained on the ground in Guerrero Negro for weather to clear before flying to Tijuana to pick up passengers at 11:30 a.m. (A copy of the certified translation that plaintiffs rely on is attached as Exhibit G.) The telex in question clearly states the Aviones plane would make the round trip that day including the return flight to Guerrero Negro at 11:30.

23. In addition, because a trip has been scheduled does not mean the company plane will make the flight. We try to use the plane as much as possible but it only makes the routine trips when available. The round trip scheduled on the day of the accident was no different from any other scheduled round trip. (Copies of the certified translations for flights scheduled the weeks of September 20, 27, and October 4 are attached as Exhibits H and I.) We try to

make three round trips a week to Tijuana leaving from Guerrero Negro and returning the same day.

24. Plaintiffs' statement that Exportadora's company plane is "maintained" in Long Beach is accurate but misleading. The plane is based and housed in Guerrero Negro. It only goes to Long Beach when repairs or servicing are needed.

I declare under penalty of perjury that the foregoing is true and correct. This declaration was executed on May 26, 1989, at San Diego, California.

/S/
Manuel Guzman

[Emphasis added. Exhibits omitted.]

* * * *

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[Filed July 17, 1989]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG; MARTIN SCHOENBERG; TOMAS SCHOENBERG; DAN A. SCHOENBERG; ADRIANA SCHOENBERG; BILL SHOENBERG; LILLY SCHOENBERG; CARMEN HERNANDEZ; MANUEL FRANCISCO HERNANDEZ; SUSAN PATRICIA HERNANDEZ; HIROKO SUGIMOTO; MITSUKUNI SUGIMOTO; YASUNOBU	CIVIL NO. 88-1530 JLI (IEG) CIVIL NO. 88-1531 JLI (IEG) CIVIL NO. 88-1532 JLI (IEG) CIVIL NO. 88-1919 JLI (IEG) CIVIL NO. 88-1920 JLI (IEG) ORDER CONSOLIDATING RELATED CASES Date: July 17, 1989 Time: 10:30 a.m. Place: Courtroom 8 Honorable J. Lawrence Irving

SUGIMOTO; KIMIKO KODANI; MAYUMI NUKIWA; KYOKO KODANI; KUNIKO OMACHI,Individually, and as guardian Ad Litem on behalf of ERI OMACHI, a minor,

Plaintiffs,

vs.

EXPORTADORA DE SAL, S.A. DE C.V., a Mexican corporation; AVIONES DE SONORA S.A., a Mexican corporation, UNITED MEXICAN STATES, a foreign state, CESSNA AIRCRAFT CO., a Kansas corporation, TELEDYNE INDUSTRIES, INC., a California corporation, DOES 3 through 65, GREEN CO., a partnership, and ROES 1 through 26, corporations, inclusive,

Defendants.

Plaintiffs' Motion to Consolidate Related Cases came on for a hearing on July 17, 1989, the Honorable J. Lawrence Irving presiding. The Court, considering the

Memorandum of Points and Authorities submitted, the Opposition, and the arguments of counsel, finds that there is good cause for purposes of efficient administration for consolidation of these related cases, arising out of the same occurrence, and aircraft accident in San Diego, California, and presenting common issues of fact and law. Accordingly,

IT IS ORDERED:

1. These related cases are consolidated;

2. Only one document need be filed, in Case No. 88-1530 JLI (IEG), to serve as a filing in all five related cases, provided that the paper filed in Case No. 88-1530 JLI (IEG) shall have a consolidated caption bearing the case numbers of all of the related cases. The caption of this Order is an example of the consolidated caption;

3. If a document pertains to only one of the cases, that document shall be so designated;

4. Only documents having special application to particular cases need be filed separately in individual case files.

Dated: July 17, 1989
San Diego, California

/s/
J. Lawrence Irving
United States District Judge

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[Filed Aug. 26, 1991]

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, MITSUKUNI SUGIMOTO, YASUNOBU SUGIMOTO, KIMIKO KODANI, MAYUMI NUKIWA, KYOKO KODANI, KUNIKO OMACHI, Individually, and as Guardian Ad Litem on behalf of ERI OMACHI, a minor	)	CIVIL NO. 88-1532 R (P) FIFTH AMENDED COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH
Plaintiffs,	)	
vs.	)	

EXPORTADORA DE SAL, S.A DE C.V., a Mexican corporation; AVIONES DE SONORA, S.A., a Mexican Corporation; CESSNA AIRCRAFT CO., a Kansas corporation, Defendants.	)	JURY TRIAL DEMANDED

COME NOW the plaintiffs and for a claim for relief complain of defendants and each of them and allege as follows:

PARTIES

1. Plaintiffs HIROKO, MITSUKUNI, and YASUNOBU SUGIMOTO, and each of them are citizens of Japan, and the surviving heirs at law of decedent KATSUO SUGIMOTO.

2. Plaintiffs KIMIKO KODANI, MAYUMI NUKIWA, and KYOKO KODANI, and each of them are citizens of Japan, and the surviving heirs at law of decedent YOSHIHITO KODANI.

3. Plaintiffs KUNIKO OMACHI and minor plaintiff ERI OMACHI are citizens of Japan, and the surviving heirs at law of HIDEO OMACHI.

4. On September 29, 1988 plaintiff KUNIKO OMACHI was appointed Guardian ad Litem of ERI OMACHI, who was at that time about seven months old.

5. Defendant EXPORTADORA DE SAL, S.A. DE C.V. (hereinafter "EXPORTADORA") is a Mexican corporation, existing under and by virtue of the laws of the country of Mexico and doing business in the State of California with substantial offices and facilities in the City of San Diego. Defendant EXPORTADORA has substantial, continuous and

systematic contacts with the State of California, and has committed a tortious act in the State of California.

6. Defendant AVIONES DE SONORA S.A. (hereinafter "AVIONES") is a Mexican corporation, existing under and by virtue of the laws of the country of Mexico and upon information and belief doing business in the State of California and in this Southern District, and has committed a tortious act in the State of California.

7. Defendant CESSNA AIRCRAFT CO., ("CESSNA" herein) is a Kansas corporation, with its principal place of business in Kansas. Said company at all times is doing business in the State of California and in this Southern District.

JURISDICTION

8. Jurisdiction over the first claim is conferred upon this court by virtue of 28 U.S.C. 1330(a) and the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2) and (5). The court has pendent jurisdiction over the other claims. Defendant EXPORTADORA'S majority share ownership is held by MEXICO, a foreign sovereign. The claims for relief arise out of the commercial activity of EXPORTADORA in the United States. The claims also are based upon an act performed by EXPORTADORA in the United States in connection with a commercial activity elsewhere. The claims further arise from commercial activity of EXPORTADORA elsewhere that has caused a direct effect in the United States, including causing the death in the United States of plaintiffs' decedents.

VENUE

9. Venue properly lies in this Court under 28 U.S.C. 1391, in that the incident out of which this matter arises occurred within the Southern District, and all defendants are corporations doing business in this Southern District, or a foreign corporation that has committed a tortious act in this

Southern District.

FIRST CLAIM FOR RELIEF
NEGLIGENCE

10. At all times herein mentioned, one RAUL GUADALUPE GUTIERREZ TELLEZ, now deceased (hereinafter "GUTIERREZ TELLEZ), was a pilot, engaged as such, in the employ of AVIONES and under the direction and control of EXPORTADORA and AVIONES.

11. EXPORTADORA and AVIONES were acting for and on behalf of each other in and about the matters alleged herein and were acting in furtherance of a joint venture or other relationship giving rise to vicarious liability.

12. At all times herein mentioned, defendant AVIONES was the owner of a certain 1980 Cessna 340A aircraft, serial no. 340A0978, and said aircraft was at all times under the direction and control of EXPORTADORA and AVIONES.

13. AVIONES was engaged in the business of providing an air taxi and air charter service. At some time on or before September 30, 1987, EXPORTADORA, while acting in the U.S., agreed with plaintiffs' decedents to provide round-trip transportation to them and engaged the services of AVIONES or entered into a joint venture or similar relationship with AVIONES, with the purposes of providing air transportation for decedents KATSUO SUGIMOTO, YOSHIHITO KODANI, HIDEO OMACHI, and two other passengers, from Guerrero Negro, Baja California, Mexico, to Tijuana International Airport, Baja California, Mexico, for purposes which were related to and in furtherance of EXPORTADORA'S business pursuits and commercial activities in the U.S. and elsewhere, and by which EXPORTADORA sought to carry out a nondelegable duty to transport round trip from San Diego, California to Guerrero Negro, Mexico, KATSUO SUGIMOTO, YOSHIHITO KODANI, HIDEO OMACHI and the other passengers who

were business visitors and clients of EXPORTADORA. OMACHI was the chief purchasing agent of a substantial customer for EXPORTADORA'S industrial salt. KODANI and SUGIMOTO were research scientists inspecting an agricultural research project that grows vegetables in the desert on the premises of EXPORTADORA'S facility at Guerrero Negro, furthering EXPORTADORA'S commercial interests of goodwill with its stockholders, the government of MEXICO and Mitsubishi Corporation of Japan.

14. On or about September 30, 1987, pursuant to and in furtherance of the above-referenced arrangements, AVIONES provided EXPORTADORA with the above-mentioned 1980 Cessna aircraft with its pilot GUTIERREZ TELLEZ for purposes of carrying out said air transportation. Because of the remote location of EXPORTADORA'S salt farm at Guerrero Negro, Mexico, the commercial activity of salt production at Guerrero Negro requires that defendant EXPORTADORA provide air transportation to business visitors and clients, such as plaintiffs' decedents. Because EXPORTADORA'S business and purchasing office in the U.S. is located in San Diego, California, defendant EXPORTADORA usually provides round-trip transportation from San Diego, California to Guerrero Negro, Mexico for business visitors, such as plaintiffs' decedents, and usually arranges said round-trip transportation in the United States.

15. EXPORTADORA represented to plaintiffs decedents, as part of the travel agreement, that EXPORTADORA would be responsible for providing the transportation. EXPORTADORA intended that plaintiffs' decedents act upon this representation and travel to Guerrero Negro and back. Plaintiffs' decedents reasonably relied on EXPORTADORA'S promise that EXPORTADORA would provide transportation, and acted on EXPORTADORA'S promise by traveling to Guerrero Negro. Plaintiffs' decedents' reliance on EXPORTADORA'S promise was reasonable, in that plaintiffs' decedents, or the colleagues or fellow-

employees of plaintiffs' decedents, had traveled round-trip to Guerrero Negro in the past with EXPORTADORA providing the transportation, and EXPORTADORA usually provides round-trip transportation for its business visitors because of the remote location of EXPORTADORA'S Guerrero Negro facility. Plaintiffs' decedents did not know, nor should they have known, that EXPORTADORA would not be responsible for the return flight. On or about September 30, 1987, EXPORTADORA substituted the chartered AVIONES airplane for EXPORTADORA'S company airplane, to carry out EXPORTADORA'S agreement to transport plaintiffs' decedents. EXPORTADORA knew that a chartered airplane might be substituted for the EXPORTADORA company airplane, and did not disclose this fact to plaintiffs' decedents at the time when the travel agreement was made. Under the circumstances, EXPORTADORA is estopped to deny that AVIONES was EXPORTADORA'S agent. EXPORTADORA is liable for the acts of AVIONES as EXPORTADORA'S agent.

16. On or about said date, the aircraft flew from Guerrero Negro to the vicinity of Tijuana Airport, and at approximately 7:56 a.m. on said day, while engaged in attempting to make an instrument approach to the Tijuana International Airport, and well in the airspace of the United States of America, said aircraft crashed in San Diego, California, killing all on board.

17. EXPORTADORA, AVIONES, and decedent GUTIERREZ TELLEZ, and each of them, were negligent about the operation, maintenance and control of the said aircraft so as to cause it to crash as alleged above.

18. By reason of the premises and as a direct and proximate result thereof, plaintiffs have been deprived of kind and loving husbands and fathers and the care, comfort, society, protection, companionship, services, support, love and affection of decedents KATSUO SUGIMOTO, YOSHIHITO KODANI, and HIDEO OMACHI all to their general damage

in a sum in excess of the jurisdictional minimum of this Court, and further damages in an unknown amount or other losses including funeral and burial expenses, the specifics of which plaintiffs pray leave to insert by amendment with the same when finally determined.

SECOND CLAIM FOR RELIEF
PRODUCTS LIABILITY

19. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 16 and 18 above set forth.

20. Defendant CESSNA was at all times engaged in the business of the design, production and distribution of aircraft into the stream of commerce and did in fact design, produce and place the Cessna 340A described above, including its component parts, into the stream of commerce at some time prior to September 30, 1987.

21. Said CESSNA aircraft, including its components, avionics and the engines therein, were defective in design and manufacture at the time they left the possession of the defendant CESSNA, and said defect or defects proximately caused and contributed to the crash of said CESSNA described herein above.

THIRD CLAIM FOR RELIEF

22. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 18, and 20 through 21.

23. Defendant CESSNA knew or had reason to know that the airplane was defective and had reason to believe that the users of the airplane would not realize its defective condition.

24. Defendant CESSNA had a duty to warn the users of the airplane of the defective condition of the airplane.

users of the airplane of the defective condition of the airplane.

25. Defendant CESSNA negligently failed to warn the users of the airplane of its defective condition. A foreseeable proximate result of defendants' failure to warn was the crash of the airplane, killing all on board.

FOURTH CLAIM FOR RELIEF

26. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 18, and 20 through 21.

27. On or about September 30, 1987, the airplane was defective. The defective condition of the airplane proximately caused or contributed to the crash of the airplane.

28. Defendant CESSNA failed to warn the users of the airplane of its defective condition, proximately causing or contributing to the crash of the airplane.

WHEREFORE, plaintiffs pray judgment against defendants and each of them, jointly and severally, as follows:

1. For general and special damages as allowed by law and according to the proof herein;
2. For prejudgment interest as may be allowed by law;
3. For costs of suit; and
4. For such other and further relief as may be proper in the premises.

DATED: August 26, 1991
Belmont, California

LAW OFFICES OF ROBIN E. FOOR

By /s/
Robin E. Foor
Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs demand that the issues herein, except those involving only defendant EXPORTADORA, be tried by a jury.

Dated: August 26, 1991
Belmont, California

LAW OFFICES OF ROBIN E. FOOR

By /s/
Robin E. Foor
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[Filed June 5, 1992]

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	Civil No.88-1532 R(POR) Consolidated 88-1920 R(POR)
Plaintiffs,	**CONSOLIDATION ORDER**
vs.	
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation, et al.,	
Defendants.	

On July 17, 1989 this Court entered an Order Consolidating Related Cases in Schoenberg, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1530. This case, and the case of Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1920, were consolidated with three other related cases under that consolidation order. The low number case, Case No. 88-1530, and two other cases from the consolidated cases, Hernandez,

et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1531, and Schoenberg, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1919, have been dismissed pursuant to settlement. Accordingly, the consolidation order of July 17, 1989 is modified as follows:

IT IS ORDERED, that:

1. The record in the consolidated cases under the former low number case Schoenberg, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1530, is part of the record in Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1532 and in Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1920;

2. Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1532 is now the low number case of the two related cases that remain pending, formerly consolidated under Case No. 88-1530;

3. The related cases of Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1532 R(P) and Sugimoto, et al. v. Exportadora De Sal, S.A. De C.V., et al., Case No. 88-1920 R(P) are consolidated;

4. Only one document need be filed, in Case No. 88-1532 R(P), to serve as a filing in the two related cases, provided that the document filed in Case No. 88-1532 R(P) shall have a consolidated caption bearing the case numbers of the two related cases. The caption of this Order is an example of the consolidated caption;

5. If a document pertains to only one of the cases, that document shall be so designated;

6. Only documents having special application to particular cases need be filed separately in individual case files.

Dated: June 5, 1992
San Diego, California

/s/
John S. Rhoades, Sr.
United States District Judge

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[Filed Jan. 7, 1993]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HIROKO SUGIMOTO, et al.,	) Civil No. 88-1532R(POR)
	)
	) **PRETRIAL ORDER**
Plaintiffs,	)
vs.	) Pretrial Date: January 4, 1993
	) Trial Date: January 11, 1993
EXPORTADORA DE SAL, S.A. DE C.V., a foreign corporation, et al.,	) Time: 9:00 a.m.
	) Place: Courtroom 5
	) Honorable James Fitzgerald
	)
Defendants.	)
	)

Following pretrial proceedings pursuant to Fed.R.Civ.P. 16 and Local Rule 16.1(f)(7),

IT IS ORDERED:

I.

This is an action for wrongful death on behalf of the heirs of three passengers who were killed in an airplane crash in San Diego County on September 30, 1987. The plaintiffs are citizens of Japan. The defendants are Exportadora De Sal, S.A. De C.V., a Mexican corporation ("Exportadora") and Aviones De Sonora, S.A., a Mexican corporation ("Aviones"). The accident occurred in the Southern District of California.

The pleadings which raise the issues are as follows:

1. The Fifth Amended Complaints, filed August 26, 1991 in case no. 88-1532 and case no. 88-1920;

2. Exportadora's Answers to the Fifth Amended Complaints, filed October 30, 1991 in case no. 88-1532 and case no. 88-1920.

II

Federal jurisdiction is invoked pursuant to 28 U.S.C. § 1330, 28 U.S.C. § 1605(a)(2), the Foreign Sovereign Immunities Act (the "FSIA"), and the doctrine of pendent jurisdiction. Exportadora, whose shares are majority-owned by the Government of Mexico, is included in the FSIA's definition of an agency or instrumentality of a foreign state, 28 U.S.C. § 1603(a) and (b)(2). Jurisdiction under the FSIA arises under federal law.

Venue is invoked on the ground that the claims arose in the Southern District of California, pursuant to 28 U.S.C. § 1391. In addition, Exportadora had an office in the Southern District of California.

Plaintiffs allege that this case arises out of the commercial activity of Exportadora in the United States, pursuant to 28 U.S.C. 1603(e), in that it is alleged that the passengers' round trip transportation from San Diego to Guerrero Negro and back was arranged through the San Diego office of Exportadora, it is alleged that the claims arise out of the commercial activity of Exportadora in the United States, including the transportation of passengers in

San Diego. It is also alleged that the claims arise, pursuant to 28 U.S.C. 1605(a)(2), from the commercial activity of Exportadora elsewhere that has caused a direct effect in the United States, including the deaths of plaintiffs' decedents.

III.

The following facts are admitted and require no proof:

1. These cases arise out of the crash of a small aircraft in the United States as the aircraft approached Tijuana Airport. The plane was on route to Tijuana from Guerrero Negro, Baja California.

2. Defendant Exportadora selected defendant Aviones to transport five passengers, to transport mail, and to pick up two Exportadora employees at Tijuana Airport for return to Guerrero Negro. On approach to Tijuana Airport through United States airspace, the plane encountered bad weather and struck the ground north of the United States - Mexican border. All five passengers and the pilot were killed. The plaintiffs in these cases are the passengers' survivors.

3. Exportadora is a corporation formed under the laws of Mexico and is 51% owned by the United Mexican States ("Mexico") and 49% owned by Mitsubishi Corporation ("Mitsubishi") of Japan.

4. Exportadora manufactures salt by evaporation from seawater at Guerrero Negro and sells it on domestic and international markets. Exportadora is one of the world's largest producers of industrial salt, manufactured at Guerrero Negro. Exportadora produces about six million metric tons of salt per year, shipped by bulk carrier to world markets. By airplane, Guerrero Negro is about 312 nautical miles south of San Diego, California.

5. Exportadora also had an office in San Diego in 1987. Exportadora maintained this San Diego office from 1974 until 1991. The San Diego office handled purchasing, communications, and shipping or transportation necessary for Exportadora's enterprise.

6. Exportadora set up a telex between the two offices. Some communications between Guerrero Negro and the outside world were communicated through the San Diego office.

7. There are no regularly scheduled commercial flights from the San Diego area to Guerrero Negro. Exportadora often transported employees and other passengers between the two offices. An Exportadora corporate aircraft often flew round trip between Guerrero Negro and Tijuana Airport. To complete the trip to San Diego, an Exportadora van from the San Diego office would generally drop off or pick up passengers at the Tijuana Airport. Exportadora's corporate aircraft was a private airplane. Exportadora's company airplane was not offered for use by any member of the public. Transportation on the company airplane was limited to company employees and other passengers who made arrangements to travel with the company.

8. Arrangements were made with Exportadora for transportation from San Diego to Guerrero Negro for the decedents. The decisions to allow the passengers to travel aboard Exportadora's vehicles were made in Guerrero Negro. The decedents were located in Japan when these transportation arrangements were made. Other passengers located in California made arrangements to travel on the same flights.

9. At the beginning of the trip, the passengers were picked up by the Exportadora van in San Diego and driven across the border into Tijuana for the flight south. Upon their return, the same van was to pick the passengers up at the Tijuana Airport and take them back to San Diego.

10. The company plane was unavailable on the day of the return flight, so Exportadora selected Aviones to fly the passengers on their ill-fated trip to Tijuana.

11. In addition to plaintiffs' decedents, there were two other passengers on board the airplane that crashed, Mr. Schoenberg and Mr. Hernandez.

12. Two of the plaintiffs' decedents, Dr. Sugimoto and Dr. Kodani, visited an agricultural station located next to

Exportadora's facilities as representatives of Tottori University in Hamasaka, Japan. The university is conducting an agricultural project on land located in Guerrero Negro. The project is studying the growing of vegetables in the desert using drip irrigation and fertilization systems.

13. Dr. Sugimoto and Dr. Kodani were professors at Tottori University. On September 18, 1987, Mr. T. Matsushita of Mitsubishi Corporation in Tokyo sent a telex to Exportadora stating that Dr. Sugimoto and Dr. Kodani would be visiting Guerrero Negro on September 23, 1987 to September 30, 1987. A true and correct transcribed copy of the telex sent by Mr. Matsushita is part of exhibit 70-25. Mr. Matsushita requested that Exportadora arrange transportation "between SAN/GN" for Dr. Sugimoto and Dr. Kodani by "pick up truck/company plane".

14. Dr. Sugimoto and Dr. Kodani arrived in San Diego on September 22, 1987 and were met at the airport by Ms. Mikiko Izumi, an Exportadora employee. Exportadora arranged and paid for their accommodations at the Executive Hotel in San Diego. On Wednesday, September 23, 1987, Dr. Sugimoto and Dr. Kodani were picked up in San Diego by Exportadora's company van and transported to Tijuana Airport. At Tijuana Airport, they boarded the Exportadora company airplane for the flight to Guerrero Negro. Their flight to Guerrero Negro, and their stay at the company's guest quarters in Guerrero Negro, was at Exportadora's expense.

15. On September 4, 1987, Mr. T. Matsushita, an employee of Mitsubishi in Tokyo, Japan, sent a telex to Exportadora requesting that Exportadora receive as a guest Mr. H. Omachi, of Asahi Chemical Ind. Co. Ltd. ("Asahi"), manager of the raw materials section of the purchasing department. The telex stated that Mr. Omachi wished to visit the salt field. The telex requested that Mr. Omachi travel from San Diego to Guerrero Negro and back "by car/co plane". The telex stated that Asahi was purchasing the fourth largest volume of salt and was one of the most important customers for salt. A true and correct copy of a transcription

of the telex from Mr. Matsushita is part of Exhibit 70-34. Exhibit 70-34 also contains additional internal company addressing added by Exportadora.

16. Mr. Omachi was planning a business trip to the United States and wanted to visit and inspect Exportadora's facilities.

17. Mr. Omachi was a purchasing agent for Asahi. Purchasing salt was part of his work. Asahi is an indirect customer for Exportadora's salt. Mr. Omachi met with employees of Exportadora while in Guerrero Negro. Mr. Omachi also flew down to Guerrero Negro at Exportadora's expense.

18. Manuel Guzman was the Exportadora manager in charge of the San Diego office in September 1987. Mr. Guzman's secretary received a request to transport Mr. Omachi. Mr. Guzman's secretary contacted Guerrero Negro to arrange the transportation for Mr. Omachi. Mr. Omachi's travel schedule was confirmed by several telexes addressed to the San Diego office.

19. Mr. Omachi was met at San Diego airport on September 27, 1987 by Mr. Shigeaki Kadomukai, an employee of Baja Bulk Carriers, S.A. ("Baja Bulk"). Baja Bulk is owned by the stockholders of Exportadora and ships most of Exportadora's salt.

20. Exportadora's San Diego office made a reservation for Mr. Omachi at the Westgate Hotel. Mr. Omachi stayed at the Westgate Hotel the evening of September 27, 1987. Exportadora paid Mr. Omachi's hotel bill.

21. On September 28, 1987 Mr. Omachi traveled in the Exportadora van from San Diego to Tijuana Airport, where he boarded the Exportadora corporate jet for the flight to Guerrero Negro. At Guerrero Negro, Mr. Omachi stayed in Exportadora's guest quarters at Exportadora's expense.

22. The Tijuana Airport lies near the border between the United States and Mexico. At the time of the crash, a Letter Agreement ("Letter Agreement"), dated June 15, 1983, existed between the United States air traffic control facility

in San Diego ("San Diego TRACON") and the air traffic control facility for Tijuana Airport ("Tijuana Approach"). The aircraft crashed just north of the border, killing all on board.

23. Exportadora arranged for round trip transportation between Guerrero Negro and San Diego for each passenger.

24. When Exportadora agreed to provide transportation to its facilities in Guerrero Negro, a passenger would often arrive at the San Diego office of Exportadora, or at a hotel in San Diego, and Exportadora would provide transportation from San Diego to Guerrero Negro and back.

25. The company airplane in September 1987 was a 10 passenger jet aircraft, with two pilots, a West Wind 1123.

26. Exportadora had a Board of Directors meeting in Mexico City on September 28, 1987. The company airplane was sent to Mexico City from Guerrero Negro on September 29, 1987, in connection with the Board of Directors meeting. On September 29, 1987 the company airplane was not available for the return flight from Guerrero Negro to Tijuana. Exportadora selected a flight from Aviones.

27. Exportadora selected Aviones for the return flight due to the unavailability of its own aircraft.

28. The day before the flight, the San Diego office was informed by telex that Aviones was selected for the flight the next day, and was informed of the schedule for an early morning arrival of the flight.

29. The flight departed early in the morning because of Mr. Omachi's travel schedule.

30. Enrique Achoy, an Exportadora employee, acting in the course and scope of his employment, selected Aviones for the flight. Mr. Achoy arranged for a twin-engine, Cessna 340A, airplane to fly the passengers from Guerrero Negro to Tijuana, with an approximate departure time of 6:00 a.m. and approximate arrival time of 8:00 a.m. The Aviones flight was arranged by Exportadora at Exportadora's expense.

31. Aviones is an air taxi company and a Mexican common carrier. Aviones advertised in the 1991 Hermosillo, Sonora phone book that it conducts flights in all of the

Republic of Mexico and part of the United States.

32. The passengers were not given any tickets for the flight.

33. The Aviones airplane arrived in Guerrero Negro from Hermosillo, Sonora on September 29, 1987. Hermosillo is about 172 nautical miles from Guerrero Negro by airplane.

34. The pilot of the Aviones airplane was Raul Gutierrez Tellez ("Gutierrez").

35. Mr. Achoy told the pilot that the destination of the flight was Tijuana.

36. On September 30, 1987 at about 6:00 a.m. the passengers boarded the airplane. At that time the passengers knew, if not earlier, that the airplane they were traveling aboard was not the same airplane they had travel aboard to Guerrero Negro. Prior to allowing the passengers to board the plane, the pilot weighed the baggage of each passenger.

37. The airplane departed Guerrero Negro about 6:10 a.m.

38. On route to Tijuana, Mexico, the pilot contacted Tijuana Approach Control and was told that the airport's operations were restricted because of fog.

39. Tijuana Airport is equipped with radar.

40. The instrument landing system ("ILS") approach to runway 090 at Tijuana Airport uses United States airspace. The pilot began an approach to Tijuana Airport's runway 090.

41. Tijuana Airport is located on the top of a mesa, about 499 feet above sea level. The approach to runway 090 is above a deep valley which ends with the hill where the airport is located.

42. The airplane impacted the hill on which the airport is located, below the level of the airport, about 389 feet above sea level. The airplane was torn apart by impact forces, killing all on board.

43. The accident occurred at 7:56 a.m.

44. At the time of the accident, the Exportadora van was waiting for the passengers at Tijuana Airport, to take the passengers to the San Diego office of Exportadora.

45. At the time of the accident, visibility at Tijuana Airport was less than the minimum visibility required for an instrument landing, and one tenth of a mile or less.

46. The pilot was sober at the time of the accident and did not have any alcohol, drugs, carbon monoxide, or other intoxicants in his blood.

IV.

The reservations as to the facts recited in Paragraph III above are as follows:

1. With respect to Section III, paragraphs 2, 26, 27, and 30, Exportadora reserves its contention that the appropriate wording is that Exportadora retained Aviones, rather than selected Aviones.

2. With respect to Section III, paragraphs 2, 26, 27, and 30, plaintiffs reserve their contention that the appropriate wording is that Exportadora chartered a flight from Aviones.

* * * *

[RT I 47:13 - 52:4]

Immediately following Defendant's
Opening Statement

THE COURT: I do have some questions and comments, and the reason I do that is because, having listened to the opening statements, I want to be sure that, while I'm not precluding evidence on issues, that at this moment I perhaps do not consider to be critical.

I do wish to suggest issues which I think are critical and which should be focused on.

Now, I realize that, Mr. Greco, you haven't been in this case except for the last year, but I have given considerable attention to the case of Schoenberg vs. Exportadora, 930 F.2d 777, Ninth Circuit (1991), a case which decided some issues in this case. That appeal decided some issues in this case.

Early in your argument you said that there's no evidence that Exportadora maintained a regular air division or air service. The District Court earlier -- Judge Irving found that Exportadora maintained a regular air and auto link between its San Diego and Guerrero Negro office as part of its commercial operations, that it arranged through its San Diego office round-trip transportation for the decedents from San Diego to Guerrero Negro and that all five decedents began their trips to Guerrero Negro in San Diego.

Those findings are critical to the conclusions reached by the Court of Appeals, and I will not review those. Those findings will be accepted in the trial of this case.

There were other findings made by Judge Irving such as,

> "The District Court did not clearly err in finding that Exportadora arranged transportation of the decedents to and from Guerrero Negro and transported them. Arranging transportation and transporting people is not an act that only a sovereign could perform.

> Exportadora engaged in commercial activity in arranging transportation for its prospective business partners."

Now, if those findings were dicta, I would not give them the importance that they have in this case, but they're not dicta because, in connection with the findings that I referred to in the first instance, the Court of Appeals went on to say,

> "Given these findings, the District Court correctly concluded that relevant activity was the round trip. The decedents did not make arrangements for legs of the trips separately. They made round-trip arrangements through the San Diego office at the outset, we consider the arranged travel a whole."

Now, I realize that the Plaintiff in this case relies on various theories of -- in which Exportadora is responsible for the activities of the air taxi operator.

The -- those issues relating to responsibility; that is, agency, I understand are in conflict and will have to be resolved here in connection with the defense raised that the air taxi operator was an independent contractor for which Exportadora has no responsibility.

But I do want both sides to understand that what the findings are that have been relied upon by the Court of Appeals in making its decision on the issues which were resolved in 1991 by the Court of Appeals, I do not intend to review and will accept that -- those findings as established.

So that then brings us to another important issue which I think is factual and has to be resolved, and that is the cause of the tragedy, the impact of the Cessna below the height of the runway 090 at Tijuana.

The Plaintiff contends that this is pilot error. The Defense contends this is air controller error, and certainly that will have to be resolved.

So what I'm suggesting to you is that, while there may be many issues in this case, certainly the critical issues will be

the proximate cause of the collision; was it the fault of the pilot; was it the fault of the air traffic controller -- and in addition the ultimate responsibility for Exportadora for arranging the transportation of the five decedents by aircraft as part of its commercial activity from Tijuana, returning to Tijuana and the bus transportation which was aborted from San Diego to Tijuana.

We'll take a few minutes now, gentlemen, and then we'll begin with the witnesses.

MR. GRECO: Your Honor, when you return, I'd just like to address one brief point. Perhaps I misspoke.

THE COURT: Sure.

MR. GRECO: Shall we --

THE COURT: No, I'm -- there's been a lot of -- there have been -- from what's been said to me in the opening statements, considerable disagreements like the -- there'll be an issue raised which may not -- I don't know if it'll be dispositive, but I believe that the Defense is standing on the theory that, in the course of this litigation, that there have been certain admissions made which now preclude the taking of positions which are advocated at the present time in this litigation.

The question will be whether these are really constituted missions [sic. admissions] or whether or not they furnish the basis of impeachment for positions now taken.

I --

MR. GRECO: I understand that, your Honor. The only thing I wanted to make clear was that I was not suggesting that Exportadora does not run aircraft between Guerrero Negro and Tijuana. That's not what I meant to say, if I said it.

What I was saying was it is not the repeated practice that Mr. Foor would have this Court believe that Exportadora shuttles vendors or business visitors back and forth.

THE COURT: Well, I merely pointed out that the Court of Appeals found that -- or agreed with the finding that the underlying -- that the underlying records that stood

at that time, at least before Judge Irving, was sufficient for him to find that it was regularly conducted.

MR. GRECO: Thank you, your Honor.

THE COURT: We'll take a 10-minute recess.

[Emphasis added.]

* * * *

[RT I 78:18 - 81:17]

DOLIAS - DIRECT

Q Does Exportadora de Sal have a post office box in San Ysidro, California?

A Yes --

MR. GRECO: Objection, your Honor -- excuse me. Irrelevant.

MR. FOOR: Your Honor, this pertains to jurisdiction.

MR. GRECO: Your Honor, we're not disputing jurisdiction, and I don't mean to be hypertechnical, but in the interest of saving time, in light of that, I just fail to see the relevance of this testimony at all.

THE COURT: What will it show, Mr. Foor?

MR. FOOR: Well, your Honor, it will -- it will show --

THE COURT: Are you satisfied with his agreement?

MR. FOOR: Well, your Honor, I'm not going to dispute what Counsel just said; however, jurisdiction could be raised at any time, and I think that it's -- unless Counsel is stipulating for all time and all purposes to jurisdiction both for purposes of the Foreign Sovereign Immunities Act and for the purposes of due process --

THE COURT: I thought that was resolved in the decision of the Ninth Circuit that jurisdiction arises here under the -- under the act and that there was some disagreement with the earlier position taken by the Plaintiff that -- in which the court resolved by saying the Federal common law applied, that certainly -- I haven't perceived any issue relating to jurisdiction based on the opening statements and certainly based on the resolution made by the Court of Appeals --

MR. GRECO: Yes, your Honor. I'm making this objection now -- not only because this person has been subpoenaed to testify, but Mr. Foor's also subpoenaed the DMV records and so forth.

I think I'll save us all a lot of time if the Court concurs with my position -- in personam jurisdiction is established. My clients have appeared.

Subject matter jurisdiction has been established, I'm told, by the Ninth Circuit. We don't dispute that; we're not taking it to the Supreme Court.

THE COURT: It'll save you a lot of time, I think, Mr. Foor. There's no contest on jurisdiction here.

MR. FOOR: Your Honor, my -- another purpose for these documents is to show that there was a business purpose for the airplane and it is in effect --

THE COURT: I --

(Pause.)

MR. GRECO: While you're thinking about that one, then another objection on the cumulative effect of this person's testimony -- I'm quite certain you'll be hearing identical questions from other witnesses including this one and, again, your Honor, not to be hypertechnical -- I'm aware of the fact that you don't like objections, but if we lay out some ground rules --

THE COURT: No, no, that's fine --

MR. GRECO: I'm sorry --

THE COURT: I'm not -- all I wanted were -- was to resolve objections, but I still like to focus on the issues here. I don't think there's any issue at all relating to jurisdiction here, either jurisdiction of this Court or subject matter jurisdiction.

So we'll -- I'll make -- unless there's an objection, I will make that finding, that based on the statements made, the Ninth Circuit decision that there is -- that this Court has both -- has jurisdiction over the parties and has subject matter jurisdiction. Is that agreeable to both sides?

MR. GRECO: It is so stipulated, your Honor.

THE COURT: Mr. Foor, will that resolve --

MR. FOOR: Well, yes, your Honor. Of course we have the burden of establishing jurisdiction if --

THE COURT: Oh, I know, but I think it's --

MR. FOOR: If Exportadora is stipulating to

jurisdiction, then I certainly have no disagreement with that.

[Emphasis added.]

* * * *

[RT I 84:14 -85:14]

THE COURT: What are the dates of the -- you see, your friend may have an objection on relevancy. Whatever -- my understanding here -- you're offering this in contention -- your argument on jurisdiction.

MR. FOOR: Yes, your Honor.

THE COURT: All right. And I said in the course of the conference that we just had, whatever the circumstances were concerning the status of Exportadora, contemporaneous with the events which bring us to this trial, it may well be relevant, and I believe that that has been resolved by the Court of Appeals and now is a non-issue in view of the court's conclusion that Exportadora was engaged in commercial activity in arranging transportation for its prospective business partners, and I don't think this is -- I don't think that issue is any longer open, but in order to support that proposition, I will allow the documents that were reasonably contemporaneous -- the documents which relate to Exportadora's present status in the United States, I will find it relevant, so that's the distinction I'm making.

Mr. Greco, I may well want to make that distinction, and although I've said to Mr. -- I've said to both sides that, even if I find them relevant, those documents that relate to the present status of Exportadora may be offered -- made as an offer of proof and will not be received but will be made part of the record.

[Emphasis added.]

* * * *

[RT III 3:4 - 8]

And so, without beating it to death, we agree that law of the case applies here with respect to the choice of law -- that is, California law -- and with respect to the fact that the Court's jurisdiction is established notwithstanding a prior claim of sovereign immunity.

[Emphasis added.]

* * * *

[RT VII 32:19 - 33:20]

GUZMAN - DIRECT

MR. GRECO: Your Honor, in this courtroom on three occasions at least, on the record, I have stated we stipulate that there was subject matter jurisdiction based on the Court of Appeals findings; we certainly stipulate that there was in personam jurisdiction; otherwise, we'd not at all be here today.

So I have no intention whatsoever of relitigating subject matter jurisdiction or in personam jurisdiction.

MR. FOOR: As your Honor knows, jurisdiction cannot be conferred by stipulation. There must be evidence. It's part of Plaintiff's burden.

THE COURT: We passed that long ago. I advised both counsel that we are not reviewing the facts and findings relied upon by the Court of Appeals in order to arrive at its legal rulings that the courts of the United States have jurisdiction of this matter -- both over the parties and subject matter and that issue will not be revisited and indeed your friend has told us that he does not intend to quarrel with that ruling, at least at this level.

MR. GRECO: Not only do I not intend to quarrel with it at this level; I intend to quarrel with it at no level, and I'll represent to the Court that past counsel in this case, Mr. John Stephens, has advised me that he doesn't intend to

quarrel with the jurisdictional finding as well as the choice of law decision made.

[Emphasis added.]

* * * *

[RT VI 72:2 - 72:6]

BREMER - DIRECT

Q Now, it's true, isn't it, that the Government of Mexico encouraged you to assist the agricultural project?
A That is correct. The Government of Mexico, through the CFM, the mining commission in Mexico, which was dealing and deals with Japan, asked us to assist them. That's correct.

* * * *

[RT VI 80:15 - 80:17]

Q And is the production from the agricultural projects sold through the company store?
A What that little piece of land produces, yes . . . .

* * * *

[RT VI 80:21 - 80:25]

Q And does the company consume part of the production from the agricultural project in the company dining room?
A When we have guests we have -- if the vegetables are really good, they're not fumigated, they're not poor quality, yes, we could use them in the restaurant . . . .

* * * *

[RT VI 92:18 - 93:13]

Q And then Guerrero Negro would telex San Diego saying than it was okay for that passenger to travel?
A Either telex or phone.
Q And then the passenger would then confirm to San

Diego that they would be travelling?
A Yes. If they didn't get there at 10:00 o'clock in the morning, or whatever time the plane was leaving, they would be left behind. But they would normally, naturally, if they had been told they could go down, they would come over here [San Diego] and, if they hadn't been to the Tijuana airport before, they'd probably get a ride through the San Diego office.
Q And that would be in the Exportadora company van?
A It could be the company van or Mr. Guzman's car.
Q In this case, when the Japanese scientists requested to travel through the San Diego office, did you say that it was okay for them to travel?
A I don't recall if I said it was okay. I probably heard they were going down there and if there was room I had no objection at all. At that time they were authorized -- I don't recall if I'm the guy that said it, but -- or they probably went through my R&D department.

[Emphasis added.]

* * * *

[RT VI 97:16 - 98:7]

Q Let me ask a more narrow question, Mr. Bremer. Was it a regular practice, that is, a routine activity, for Exportadora to transport passengers round trip from San Diego to Guerrero Negro?

MR. GRECO: Object; ambiguous as to "passengers", your Honor. And by that I mean passengers could mean --

THE COURT: He's objecting to the generic term "passengers". I'll allow the generic term to be used. Go ahead.

THE WITNESS: Most likely, yes, we would transport them to and from, if they requested such transportation.
BY MR. FOOR:
Q And it's true that the regular practice was that they would be transported round trip from Tijuana to Guerrero

Negro in the company airplane.
A On our company plane or on an air taxi if we didn't have a company plane.

[Emphasis added.]

* * * *

[RT VI 98:25 - 99:6]

Q And it's true that the Exportadora van regularly went from San Diego to Tijuana carrying passengers and mail, correct?
A If there was a flight and there was somebody coming from the San Diego side, yes, the company van would go to the Tijuana airport. Not necessarily every time, but whenever it was necessary, yes, they would.

* * * *

[RT VI 126:16 - 127:4]

Q Mr. Bremer, as to Exhibit 70-28, the call letters XAKUV, do those call letters refer to a charter flight?
A That would most likely refer to an air taxi, yes, sir.
Q This air taxi referred to in 70-28 was a company flight, was it not?
A Well, it must have been arranged by the company, yes.
Q Arranged and provided by the company for the passengers.
A If our plane was out of service, we most likely requested an air taxi. The same thing on 29. That's an air taxi.
Q So, again, that would be an air taxi that would be a company flight that day.
A It would have been arranged by the company, yes.

[Emphasis added.]

* * * *

[RT VI 130:24 - 131:3]

Q Mr. Bremer, it's true, isn't it, that the Aviones charter flight was a substitute for the Exportadora company airplane?

A Most likely it was, yes. There was no company plane so they looked for an air taxi to substitute.

[Emphasis added.]

* * * *

[RT VI 144:16 - 146:3]

Q Now, referring to 70-44 and -- actually, 70-41 and then 70-44 -- Mr. Bremer, do you know whether Mr. Omachi's transportation was arranged through the San Diego office by Mr. Guzman's secretary?

(Pause.)

A San Diego may have arranged to receive him here in San Diego, yes.

Q And Doctor Sugimoto's and Doctor Kodani's transportation was also arranged through the San Diego office, wasn't it?

MR. GRECO: Your Honor, again, this is cumulative of the pretrial order. These telexes are already referred to, not only for Mr. Omachi, but for --

THE COURT: It is cumulative, isn't it? I ordinarily don't sustain objections on cumulative, but this has been all covered.

MR. FOOR: No, your Honor. There's been no stipulation about this. The pretrial order refers to a telex sent from Mitsubishi to the San Diego office of Exportadora but I don't believe that Counsel has stipulated that their transportation was arranged through San Diego.

THE COURT: I thought there had been considerable testimony given as to how these arrangements were made by earlier witnesses. But you may have the question.

THE WITNESS: Here I'm reading what I received.

Mr. Omachi most likely was received and taken to Tijuana by the San Diego office. Most likely we received him down there. The other people, I don't recall how they made their arrangements exactly, if they went through the San Diego office, if they went down in the company plane. I know they came back in the company plane, but I don't recall exactly how they -- I don't recall.

(Pause.)

BY MR. FOOR:

Q In the ordinary course of business the flights for Mr. Kodani and Mr. Sugimoto also would have been arranged through the San Diego office, correct?

A Could have been.

[Emphasis added.]

* * * *

[RT VI 147:3 - 147:13]

Q All right. Looking at Exhibit 70-62, that indicates that Doctor Sugimoto, Doctor Kodani, and Mr. Omachi all had their return travel scheduled on the company plane, isn't it?

A That's correct, on Wednesday the 30th. They're on the list.

Q And 70-62 is the schedule for the company airplane, isn't it?

A This is the list or schedule that the people in the administrative department draw up and make for the full week.

[Emphasis added.]

* * * *

[RT VI 154:12 - 154:21]

Q But it's true, isn't it, that in 1987 the Japanese scientists traveled by airplane from Tijuana to Guerrero Negro?

A In that particular time, yes, sir.

(Pause.)

Q Directing your attention to Exhibit 70-5, the specific request for Japanese scientists, for example Doctor Takeuchi and Doctor Toyama, was a request for transportation on company flights.

A That's correct.

[Emphasis added.]

* * * *

[RT XII 34:22 - 35:6]

BREMER - DIRECT

Q All right. Now, in this telex it refers to company plane or pickup truck with respect to transportation; do you see that?
A That is correct.
Q Explain to your Honor what your understanding of what that means is, if you have an understanding.
A It's a -- if we have an airplane -- if there's room on an airplane available, if we could please take them down by plane -- take them down. If not, take them down by pickup truck.

* * * *

[RT XII 15:22 - 16:17]

Q Now, it's true, isn't it, that Exportadora generally provided free air transportation on its company-owned aircraft for the scientists on the agricultural project in 1987 prior to the time of this occurrence?
A That's correct.
Q And the scientists were included on the regular flights on the company airplane?
A If they requested and there was room, yes, they were transported.
Q And it's true, isn't it, that the communications for the travel arrangements for the Japanese scientists and for Mr. Omachi were channeled through the San Diego office of Exportadora?
A That's correct.

[Emphasis added.]

* * * *

[RT XII 81:12 - 81:15]

Q Mr. Bremmer, do you know where the request for Mr. Omachi's travel originated? Whether it originated with Mr. Omachi, or whether it originated at Mitsubishi?
A It originated at Mitsubishi.

* * * *

[RT XII 81:25 - 82:3]

Q Do you know whether the requests for the Japanese scientists to visit Exportadora originated with the Japanese scientists -- with them contacting Mitsubishi?
A Most likely, yes.

* * * *

[RT XII 83:24 - 84:7]

Q Did you approve the transportation for Doctors Sugimoto and Kodani?
A I don't recall if I approved -- well, if I didn't disapprove it, then my department approved it.
Q And, then, do you know whether your department then communicated their approval to the San Diego office?
A Most likely they -- not necessarily my department, probably the administrative department communicated with the San Diego office and told them okay, put them on the list.

[Emphasis added.]

* * * *

[RT XII 84:16 - 87:1]

Q I'd like to show you a document that's been marked as Exhibit 80 in this matter. This is an excerpt from Mr. Guzman's deposition. Do you agree with Mr. Guzman's

statement that in every case where the company provided one-way transportation, the company provided round-trip transportation?

THE WITNESS: Well, every time that they requested transportation they were taken down there, and we brought them back, naturally. How we brought them back, that's a different story, but they were -- naturally you try and bring the person back.

BY MR. FOOR:

Q All right, and it's true, then, in this case the passengers were transported round trip by Exportadora?

A I assume they were.

Q And the Aviones charter flight was acting for Exportadora in transporting these passengers?

A Well, when the company plane was not available then the administrative department called in an air taxi to return them.

Q All right. So, the Aviones charter flight was a substitute for the Exportadora company airplane?

MR. GRECO: Objection; calls for a legal conclusion, your Honor. What he's trying to do, if I may, is bring this -- use this phraseology of substitute from that Croche [sic. Croce] decision, and I think that's a legal conclusion; that's the basis of my objection.

THE COURT: I understand the basis of your objection. He may testify in lay terms --

MR. GRECO: Fine.

THE COURT: -- as to what the arrangements were made.

MR. GRECO: Thank you.

THE COURT: You may answer.

THE WITNESS: Well, the plane -- not having the company plane -- it rented an air taxi to return its passengers back to Tijuana.

BY MR. FOOR:

Q All right, and it was Exportadora that arranged the air taxi as a charter flight?

A Arranged the air taxi to go to Guerrero Negro and

stay overnight and leave the next day; that's correct -- Exportadora.

Q All right, and the passengers themselves did not arrange this air taxi?

A That is correct.

Q And the air taxi was acting for Exportadora in transporting these passengers?

A We rented the air taxi, and we paid for the air taxi.

[Emphasis added.]

* * * *

[RT XII 95:19- 99:2]

Q Now, it's true, isn't it, Mr. Bremmer, that Exportadora assisted the agricultural project at the request of the Government of Mexico?

A In those days there was contact with the CFM, but it was still not JICA. JICA is the project that definitely is working there now; they are -- this would be some request from the Government from the Mining Commission of Mexico ["CFM']. In those days it was a total university professors, and they were -- we had -- Exportadora had agreed to let them test their methods of planting in the desert; so, the Government of Mexico -- unless the company is considered the Government of Mexico because it's 51 percent Government -- we let them come in, and we let them use the company plane, if they requested it, and there was room available.

Q All right. I'd like to read to you from Exhibit 72-2, a declaration by Mr. Guzman, of February 22nd, 1989, beginning at page two, line 22, and I quote,

> "Although Exportadora has no involvement in the experiment, it has been encouraged by the Government of Mexico to assist the Japanese as a courtesy to its co-stockholder in Exportadora and Tottori University."

A Not necessarily. He wouldn't know that -- I don't think -- he was not involved in the project, and it was the Japanese partners, yes, that invited Tottori, and Exportadora that accepted them in those days. Naturally, the Government of Mexico knew about it because being that it was an agricultural product -- an agriculture -- it wasn't salt making, then the report that they developed, these Japanese gentlemen, or agricultural people, we did supply -- we did give copies to the Agricultural Department of Mexico, but they didn't order us to do things.

Q It was not an order from the Government of Mexico?

A No.

Q I'd like to read to you from the deposition of Manuel Guzman of May 1, 1989, at page 52, beginning at line 1,

> "Question: You were saying the Mexican Government has, but Exportadora has no connection with the project?
> Answer: By instructions from the Mexican Government we provide them with some assistance."

And beginning at line 12,

> "Question: What kind of assistance does Exportadora provide?
> Answer: Something they require of us for parts, water, electricity.
> Question: And Exportadora does that at the request of the Mexican Government?
> Answer: Yes, it does."

A Well, he's referring -- see, we're all mixing up the Government -- this agricultural project. If it's Tottori, yes, we signed an agreement with Commission Munteminero (phonetic) and the Japanese Government, JICA, was signed, I think, in 1988, the agreement -- the formal agreement for a five-year research. But prior to '88 this was the University of Tottori that was doing the experimentation down

there -- professors from the University requested by Mitsubishi. Exportadora, yes, it is a Mexican-Government company, we were assisting the professors, we did accept them to go down there and do their experimenting. So, you can -- it's very easy to confuse now, after the formal agricultural project, after '87, and the intent or the initiation of this for the studies being done by Tottori before '87 -- before '88. So, many people don't know we didn't have a contract. Mr. Guzman and I up here didn't know whether there was a contract or no legal contract between CFM and the Mining Commission of Mexico and JICA, for example, in which Exportadora was involved as being the Government salt field operating in Baja; so, therefore, we were requested to give some -- this assistance, which we do give this assistance to them.

Q All right. So, is Mr. Guzman's testimony accurate that there was a request by the Government of Mexico before 1987 or during 1987 that Exportadora assist the agricultural project?

A There could have been a request from the CFM, "Okay, keep studying this agriculture" -- there could have been, I'm not -- there were no orders given, but there could have been the request, and Mitsubishi was interested in these professors studies of the desert; so, it's not a lie -- I mean, he -- it could be correct, but formally, in '88 we signed it.

[Emphasis added.]

* * * *

[RT XII 108:8 - 108:24]

Q Now, a customer visiting Exportadora's facility -- that benefits Exportadora either immediately or ultimately; doesn't it?

A It could benefit.

(Pause.)

Q And Exportadora did accept the request for Mr. Omachi to visit Guerrero Negro?

A Yes, apparently it did -- yes.
Q And Exportadora agreed to transport Mr. Omachi to Guerrero Negro?
A Apparently they did, yes.
Q And Exportadora accepted the request for Doctors Sugimoto and Kodani to travel to Guerrero Negro?
A Yes, they did accept it.
Q And Exportadora agreed to transport Doctors Sugimoto and Kodani?
A If it said they did, they did, yes.

[Emphasis added.]

* * * *

[RT XII 109:9 - 109:11]

Q All right, and assisting the agricultural project as requested by Mitsubishi also provides stockholder goodwill?
A Well, I would imagine so -- it could.

[Emphasis added.]

* * * *

[RT XII 183:19-184:11]

ACHOY - DIRECT

Q What discussions did you have with the pilot on the evening of the 29th of September in the year 1987?
A The only thing was that fuel had been loaded, and he told me that it was fine in order to get to Tijuana - - that there was enough, and I told him if the weather is bad, as a comment, that he could go to Mexicali.
Q All right. Now, with respect to the 6:00 a.m. departure time was it the pilot that made the decision to depart at 6:00 a.m.?
A Yes.
Q All right, and you - - as I understand your testimony you told the pilot that the airplane was to go to Tijuana, correct?
A Yes.
Q And could you tell us again what you told the pilot about Mexicali?
A I told him as a comment that if conditions were not good there in Tijuana, that he could go to Mexicali.

[Emphasis added.]

* * * *

[RT XIV 9:17 - 9:25]

ACHOY - CROSS

Q Now, the company airplane made a regular Monday, Wednesday, Friday round trip from Tijuana to Guerrero Negro.
A Yes.
Q And the regular morning flight was from Guerrero Negro to Tijuana.
A Yes.
Q And this flight was the regular Wednesday morning

company flight.
A Yes.

[Emphasis added.]

* * * *

[RT XIV 15:22 - 16:17]

Q Why did you send Exhibit 70-66 to the San Diego office?
A I would send it to Gerardo Luna (phonetic) because it was the schedule.
Q You also sent a copy of 70-66 to Manuel Guzman in San Diego, correct?
A Yes.
Q Why would you send a copy to Mr. Guzman?
A Because the telex automatically sent copies to all the offices. It was a procedure.
Q So it was a standard procedure for any company flight?
A Yes.
Q And the company would have a van waiting, for example, at the Tijuana airport, as in this case, for the passengers.
A Yes.
Q Whenever there was a company flight, Exportadora would tell the pilot when to depart, correct?
A Yes.
Q And you would tell the pilot to carry certain passengers, since not everyone was allowed to travel, only those invited by Exportadora.
A That is so.

[Emphasis added.]

* * * *

[RT XIV 17:9 - 17:18]

Q In this case, for example, you told the pilot to pick up passengers in Tijuana.
A Yes.
Q And then part of the standard procedure was to prepare a passenger manifest as a list of passengers.
A Yes.
Q And that was done for any company flight.
A Yes.
Q And it was done for this flight.
A I do not recall.

* * * *

[RT XIV 38:3 - 38:8]

Q And Aviones was selected because the company airplane was not available?
A Yes.
Q And Aviones was acting for Exportadora in transporting these passengers?
A Yes.

[Emphasis added.]

* * * *

[RT XIV 38:22 - 39:1]

Q But you know that they were scheduled to go back on it [the company airplane].
A According to the information on the telex.
Q And the only reason that they were on a charter flight was because the company plane was not available.
A Yes.

* * * *

[RT XIV 41:4 - 41:13]

Q Now, you mentioned that after you met the pilot, you went to the company dining room.
A Yes.
Q Would you describe the scene that evening, September 29th, in the company dining room?
A Yes.
Q Who was present?
A We went through the kitchen door. A group of Japanese were having dinner to my left. I approached them and I introduced the pilot.

* * * *

[RT XIV 53:7 - 53:14]

Q All right. And Exportadora made the decision for a 6:00 o'clock departure.
A Yes, if there was something written, it must have been.
Q It was Exportadora's decision.
A Well, it's because Exportadora is a lot. I don't know.
Q The passengers were only told to be at the airport early the next morning.
A At dinnertime we came to that agreement.

* * * *

[RT XIV 54:10 - 54:12]

Q Now, you never told any of the passengers that Exportadora would not be responsible for the return flight.
A No, I did not see them except for that one time.

[Emphasis added.]

* * * *

[RT XIV 54:20- 55:12]

Q You never told the passengers who the pilot worked for, correct?
A I do not recall.
Q Exportadora always provided round-trip transportation for guests who arrived on the company airplane in Guerrero Negro.
A Whoever went had to return, but not necessarily in the company airplane. I don't know what arrangements may have been made.
Q All right. In this case, Exportadora transported the guests back to San Diego.
A What I know is Aviones Sonora was going to transport them to Tijuana.
Q But it was Exportadora who had the agreement with Aviones.
A Yes.
Q The passengers had no agreement with Aviones.
A No.

[Emphasis added.]

* * * *

[RT XIV 55:24 - 56:8]

Q Let me understand your testimony then. Your testimony is that the pilot was introduced to the passengers.
A Yes.
Q And that he was introduced as the pilot that Exportadora chose for the company flight the next day.
A It was not emphasized. It was said, "This is the pilot that is going to take you." That's how I told them. "This is going to be your pilot tomorrow."
Q All right. And that's all that was said?
A That I recall, yes.

[Emphasis added.] * * * *

[RT VII 77:2-6]

FRAZIER - DIRECT

Q Ms. Frazier, you told Mr. Hernandez that, if he and Mr. Schoenberg traveled to San Diego, then Exportadora would transport them round-trip to Guerrero Negro and back, correct?
A Yes, I did.

* * * *

[RT VII 12:3-13]

GUZMAN - DIRECT

Q Now, referring to paragraph 4 on page 2 of this declaration [Exhibit 72-3], and I quote -- referring to the agricultural project, quote:

> "Although Exportadora has no involvement in the experiment, it has been encouraged by the government of Mexico to assist the Japanese as a courtesy to its co-stockholder in Exportadora and Tottori University."

Unquote. That's a true statement, isn't it?

A Yes, sir.

[Emphasis added.]

* * * *

[RT VII 21:17-22:13]

Q Now, quoting from paragraph 9, I quote:

> "The other three passengers on the flight were Japanese. Two were members of Tottori University in Japan which has been conducting an agricultural experiment on land next to Exportadora's production facility with the cooperation of the Mexican government. The third apparently was returning to Japan from Mexico City and Exportadora had been asked to arrange air transportation for him to Tijuana."

Unquote. Now, it's true that two of the passengers were from Tottori University; is that right?

A From my recall, yes, they did.

Q And it's true, too, that Ms. Izumi [San Diego employee] handled communications with Tottori University, didn't she?
A Yes, she did.
Q But it is not true that the third passenger was returning to Japan from Mexico City, is it?
A I don't remember that.

[Emphasis added.]

* * * *

[RT VII 23:6-17]

Q Now, referring to page 2, paragraph 6, in the last sentence it says, and I quote:

> "Exportadora is not involved other than providing assistance as requested by the government of Mexico."

Unquote. Is that a true statement about the agricultural project?
A Yes, it is.
Q And part of the assistance that you provide to the agricultural project is transportation for the Japanese scientists, correct?
A Yes, it is.

[Emphasis added.]

* * * *

[RT VII 26:3-11]

Q Your statement that the San Diego office had no records indicating that Mr. Omachi intended to visit your offices -- that is not true, is it?
A That is -- okay, is not true.
Q In fact, the morning that the airplane crashed, you were waiting for Mr. Omachi at the San Diego

office, weren't you?
A Yes, I received instructions from Mexico City to meet the plane, and I saw the passenger list.

* * * *

[RT VII 29:8-11]

Q And on Wednesday, the 30th, Doctor Sugimoto, Doctor Kodani and Mr. Omachi were scheduled for return flight in the company airplane according to this document, correct?
A That's correct.

[Emphasis added.

* * * *

[RT VII 41:14-19]

Q Mr. Guzman, is it true that, on page 158 [of your deposition], beginning at line 21, that you have personal knowledge or are personally familiar that in any case you can think of where the company provided one-way transportation, the company provided round-trip transportation, correct?
A Normally, we provide round-trip transportation.

* * * *

[RT IX 3:10 - 3:22]

FISHER - DIRECT

Q Mr. Fisher, what is your understanding of what the visibility minimums are for what is called visual flight rules weather -- that is, VFR weather in the United States?

A In the United States, the minimums are a ceiling of 1,000 feet or a visibility of three miles.

Q What is your understanding of what is the required minimum visibility in Mexico in 1987 for VFR weather?

A I understand that the minimum -- the VFR minimums in Mexico at that time were five miles.

Q And is there a ceiling minimum also in Mexico for VFR weather in 1987?

A Also 1,000 feet, the same as in the U. S.

* * * *

[RT IX 9:24 - 10:19]

Q If a pilot, on September 29, 1987, had called the San Diego Flight Service Station -- let me rephrase that.

If a pilot, on September 30, 1987, early in the morning had called by telephone the San Diego Flight Service Station, what forecast would he have found for the San Diego area for the morning of September 30th?

A At what time of day?

Q Well, let's say the forecast for 8:00 o'clock in the morning on September 30, 1987.

A And what time would he have called to get the information?

Q Let's say that he called at 5:30 in the morning.

A All right. At 2:33 in the morning, a forecast

was -- probably for San Diego, which was valid from 3:00 a.m. that day -- the 24-hour forecast -- until 3:00 a.m. the next day -- these are Pacific Daylight Times I'm talking about now. The forecast was for a ceiling of 200 feet obscured -- an obscuration there -- visibility, one-half mile with fog, occasionally a ceiling of 200 feet broken and two miles with fog. And that would be valid until 11:00 a.m. Pacific Daylight Time.

[Emphasis added.]

* * * *

[RT IX 11:5 - 11:23]

Q All right. Now, let me ask you a question about that, Mr. Fisher. What is your understanding of what is the required minimum visibility for an instrument landing for this particular flight, XA KOA, at Tijuana Airport on the morning of September 30, 1987? Do you have an understanding of what the required minimum visibility is for an instrument landing?

A With just a little bit of ambiguity, I have an understanding, yes. It's either three-quarters of a mile or one mile, as the landing minimums there, I guess depending on the type of aircraft operation. I'm not quite positive which one applied in the case of this aircraft.

Q I see. But, in the event that either one of the two minimum visibilities that you just mentioned applied, isn't it true that the forecast of half-mile and 200 feet ceiling would be less than minimum visibility?

A The forecast for San Diego would be less than the landing minimums under any circumstances at Tijuana, yes.

[Emphasis added.]

* * * *

[RT IX 14:11 - 15:16]

Q Mr. Fisher, could you identify for the record Exhibit 12-3?
A Exhibit 12-3 are what are called San Diego County forecasts. These are plain-language forecasts that are often broadcast, starting on the 29th of September.
Q Does Exhibit 12-3 contain the kind of broadcast that would be, say, broadcast on the radio?
A Yes.
Q Commercial radio? And what kind of weather forecast is contained in 12-3 for the morning of September 30, 1987 as to fog?
A There are at least two forecasts -- I think three forecasts issued here, each of them in two sections -- one of them for downtown San Diego and one of them for San Diego County, which is broken up into sections. The first forecast was issued at 10:00 a.m. on the 29th. This would be a 24-hour forecast. They are saying, "A weak, shallow marine flow will send fog and low clouds inland during the late-night-through-mid-morning hours," talking about the morning of the 30th.

And at 4:00 p.m., they say basically -- they say, "Coastal strip and inland valleys, coastal low clouds and fog, night and morning." So, that's just to verify that narrative there. The forecast that was issued at 4:00 p.m. -- that would be six hours later on the evening of September 29th -- said basically the same thing. The text says, "Low clouds with areas of dense fog along the coast, will continue night and morning hours." And they go on to say, "The coastal strip will experience coastal low clouds and fog, with areas of locally dense fog mainly in the early-morning hours." [Emphasis added.]

* * * *

[RT IX 30:17 - 31:4]

Q Is it your understanding that this [Tijuana] forecast for temporary ceiling 1,000 feet, two miles is an IFR weather forecast -- forecast for IFR weather conditions?

A That would be IFR weather conditions, yes.

Q And so, is it right, then, that the forecast here on this third page of Exhibit 12-6 for the time prior to 8:00 o'clock in the morning on September 30th was an IFR weather forecast?

A The forecast was for IFR conditions. The four miles would make it even a prevailing IFR condition. And then, it's temporarily even lower, still IFR, valid until 8:00 a.m. That forecast was later revised, incidentally, downward.

[Emphasis added.]

* * * *

[RT IX 35:16 - 35:25]

Q What was the weather observed at Tijuana at 7:00 o'clock in the morning on September 30, 1987?

A At 7:00 a.m., Tijuana was observing an indefinite ceiling of 900 feet. With an obscuration, sir, the ceiling is always classified as indefinite because with an obscuration, we have ground-based phenomena. And so, this is basically just simply the vertical visibility. He's claiming he can see upward for 900 feet.

The horizontal visibility, meanwhile, was zero with fog.

[Emphasis added.]

* * * *

[RT IX 36:13 - 36:24]

Q What was the weather observed at Tijuana at 7:15 a.m. on September 30th?
A At 7:15, a teletype message -- again, this was not logged on their observation form. But, a teletype message was issued saying that they had gone to a partial obscuration, visibility was up to one mile with fog, haze and smoke. Nine-tenths of the sky was obscured. That means he could just see up through just a little hole up at the top. He could see up to the sky.
THE COURT: What was visibility, again?
THE WITNESS: One mile, sir.
THE COURT: All right.

[Emphasis added.]

* * * *

Q Do you have an opinion to a reasonable probability as to whether all of the forecasts for the morning of September 30, 1987 were for IFR weather conditions at Tijuana Airport for the time of arrival --
A They were either --
Q Excuse me, let me finish -- for the time of arrival of XA KOA at any time prior to 8:00 o'clock in the morning?
A Prior to 8:00 a.m. -- between 4:00 and 8:00 a.m., forecasts were either for IFR conditions or conditions below IFR minimums.
Q When did the forecast for Tijuana change to below-minimum conditions?
A At 7:30 a.m.

[Emphasis added.]

* * * *

[RT IX 38:3 - 38:12]

Q Do you have an opinion to a reasonable probability as to what the visibility was at the time of the accident at 7:56 a.m.?
A At Tijuana Airport?
Q Yes.
A At the airport at 7:56 a.m. -- at 8:00 a.m., they were still forecasting one-tenth of a mile.
So -- correction, they were still observing one-tenth of a mile. So, the visibility then was roughly two short city blocks at the airport.

* * * *

[RT IX 65:17 - 67:19]

FISHER - REDIRECT

Q Was Mexicali VFR all morning September 30, 1987?
A Yes, it was. The ceiling was unlimited and it had good visibility.

* * * *

[RT VII 85:2-86:3]

ROSS - DIRECT

Q What did you observe concerning the attachment of the wings to the airplane?

A The wings are attached to the fuselage through heavy carry-through spars through the fuselage. These were twisted and torn out of the fuselage, and it was basically separate, but the fuselage area -- cabin section was still laying on top of the wing section, although left and right was reversed.

The left wing was where the right wing should have been. The right wing was where the left one should have been.

In other words, the wings made 180 turn -- or 360 turn, actually, underneath the fuselage as they tore out.

(Pause.)

Q Is there a picture that shows that -- of these pictures?

A Not specifically. There are some pictures that I can point to, but from the picture you can't tell left or right, and the way I identified that the left wing was over on the right side of the fuselage was by part numbers, stamped in the wings themselves.

Q Did you have an impression of the amount of energy involved in that kind of damage to the airplane?

A Not specifically, although it was a tremendous amount of energy. In fact, the aircraft was not at a low or slow speed or stall speed. It was traveling at a high rate of speed.

* * * *

[RT VII 87:5-18]

Q What causes this kind of deformation of the exhaust stacks?
A This -- these exhaust stacks -- what you can see here have a definite crease in them. These are stainless steel stacks and very tough, very heavy, and for them to deform in that manner, they would have to be -- these stacks run red hot. They're red when the engines are running. At night you can look out and see red-hot exhaust stacks. For them to deform with nearly a V-shape in them, they would have to be hot. They would not deform that way from a cold state.
Q And if the exhaust stacks were hot, would that indicate the engine was running?
A Yes.

* * * *

[RT VII 89: 16-22]

Q What would indicate to you that it may have been running hot?
A The discoloration on the pipe. Again, that's a stainless steel pipe, and part of it is torn away; part of it is gone, and if that were cold, it would probably pretty well be intact. It wouldn't tear apart like that unless it was hot and, again, these stacks run red hot.

* * * *

[RT 91:8-16]

Q What causes the propeller hub to shatter in this manner?
A Primarily striking an object with power on it. If it strikes an object without power, it very seldom

shatters.

(Pause.)

Q So from what you saw of this propeller hub, it was your impression that the engine that this hub was attached to was under power at the time of impact?

A Yes, it had power on it.

* * * *

[RT 92:8-19]

Q Now, looking at the turbocharger at the bottom of 27-14, could you tell us whether you could form any impression from looking at that turbocharger that day?

A Yes, the turbocharger was rotating at some speed, high speed, during the crash sequence, because the blades are bent in the direction opposite of rotation, and there was rubbing on the casting where the blades rubbed and bent.

Q So that would indicate that the engine that that turbocharger was attached to was developing power at the time of impact?

A That's correct.

* * * *

[RT VII 93:22-94:6]

Q What are we looking at in that picture?

A You're looking at the piston that is inside of the prop hub which we had seen a fragment of awhile ago. The piston, the spring and the push rods that control the pitch of each propeller blade. Each one of these push rods is attached to a pin or an arm on the propeller blade which controls the pitch, and again you can see the elongation of the holes of these push rods which

also indicates power on the propellers to tear out and elongate the holes.

* * * *

[RT VII 95:14-22]

Q Could you tell us what you see in that picture?
A That looks like at least two blades of a propeller. (Pause.)
Q Now, is it significant the way in which the propeller blades are bent?
A The one that's -- I can't tell if it's sticking up in the air or sticking up to the right -- is twisted and curled somewhat, which is indicative of power being applied to the propeller.

* * * *

[RT VII 96:25-97:14]

Q What did you observe concerning the shape of that left tip tank?
A This picture shows a portion -- forward portion of the tip tank and the lines hooked to the pump that's imbedded within the tip tank and the solid bulkhead or the face of the tip tank and it is bulged out like it had a lot of fuel force on it, like a hydraulic'ing effect or we call it -- in the industry, we call it a hydraulic'ing effect to push that bulkhead out into a dome shape.
Q Does that mean there was fluid in the tank at the time of impact?
A Yes. Had there been no fuel in that tank, it would have probably been bent in the opposite direction, but the force of the fuel ballooned the tank out or barreled out in that fashion.

* * * *

[RT 104:12-15]

THE COURT: All right. Tell me, Mr. Ross, how many air crashes have you investigated?

THE WITNESS: I can't give you an exact number. Well over a hundred.

* * * *

[RT VII 106:1-2]

THE COURT: Do you wish to voir dire, Mr. Greco?

MR. GRECO: No, your Honor. I stipulate that the gentleman's a qualified expert. . . .

* * * *

[RT VII 107:10-19]

Q Mr. Ross, in the pictures that you took at the scene of the accident, are there any that you could point out to us that you believe are of significance as to causation for this accident?

A The picture that I took at the scene?

Q Yes.

A Just from the pictures alone, I don't know that there's anything that I could point out to you as cause of the accident except the aircraft was flying too low to clear the surrounding terrain.

* * * *

[RT VII 109:16-110:11]

Q Is there a picture of the other turbocharger?
A Yes, there's a picture of both turbochargers, left and right, and both of them showed indication of rotation during the crash sequence.
Q And that indication of rotation would mean that the engine to which both -- both engines then were developing power at the time of the crash?
A Yes. The engines have to be running in order for the turbochargers to be running. The exhaust system powers the turbochargers.
Q Now, referring to the third picture that is attached to the NTSB report, I think you testified earlier that there was an indication of hydraulic'ing which would mean that there was some fluid in that fuel tank at the time the impact occurred, correct?
A That's correct.
Q Could you tell us as an expert what became of the fuel?
A Well, in an impact like this, that fuel will just vaporize up into the air. It'll just so to speak splash up into the air and disintegrate and disappear.

* * * *

[RT VII 121:9-18]

Q And when you arrived to the crash site, in fact some of the wreckage had already been stolen; isn't that correct?
A That's correct.
Q And in fact, at the time you arrived at the crash site, the engines had been stolen, correct?
A Correct.
Q And at the time you arrived at the crash site, the

propellers had been stolen; is that --
A Correct.

* * * *

[RT VII 123:24-124:23]

Q Do you know whether it was necessary in this case to have the motors torn down at some point?
A From what I saw from other people's examination of them and their pictures, I don't think so.
Q All right, and why do you say that?
A Because there was every evidence of being plenty of power on the engines.
Q All right, so you do feel there was power on the engines at the time of the collision.
A Yes.
Q And you base that on what, sir?
A On pictures of the engines and the propellers and pictures -- the NTSB pictures I saw later.
Q And in particular you base your opinion that the engine was under power with respect to the propeller on the fact that the propeller piston was fragmented; is that correct?
A Say the last part of that again, please.
Q You're basing your opinion, at least some of it, on the extent to which the engine was under power on the fact that the propeller piston was fragmented or unglued; is that correct?
A Yes, and the blades were twisted and curled, indicative of striking the ground with power being applied.

[Emphasis added.]

* * * *

[RT VII 125:7-14]

Q In other words, the motors were running.
A That's correct. When you say "under power", that may be -- mean to someone that the engines were underpowered.
Q Underpowered. I see what you mean. No.
A Yes, but they had -- power was being applied to the engines.
Q All right. And you're quite certain of that.
A Yes.

* * * *

[RT VII 131:23-132:16]

Q And you had that concern because you knew that the disappearance of the wreckage would preclude you from determining the cause of this accident, didn't you?
A Not entirely.
Q All right. To what degree --
A I had enough evidence there and what I saw from other people's early work on it that I don't think there was any question about -- most of my questions about the airplane were answered.
Q What were your questions about the airplane that were answered?
A Were the engines running? How did it strike the ground? How did it come apart? And so on.
Q All right.
A I could pretty well determine all of that.
Q Except for the propellers, correct?
A Well, I looked at the pictures of the propellers, and they definitely showed signs of good power or high rotation.

[Emphasis added.]

* * * *

[RT VII 137:14-23]

Q You do have an opinion as to what caused this accident, don't you?
A Yes. Two probably main factors was the weather and probably the qualification of the pilot which I cannot substantiate.
Q When you say "the qualification of the pilot", what is your opinion in that regard?
A I've heard that he was not instrument current, but I don't know that. That's hearsay. I cannot testify to that directly.

[Emphasis added.]

* * * *

[RT VII 144:15-145:1]

Q One last question for you, sir. Did you -- did you or did you not make any effort to determine whether the ILS equipment at Tijuana Airport was operating properly during the morning of September 30, 1987?
A I did not make an effort, but the NTSB did and they flew -- they -- when I say "they", I don't know who "they" are, but there was a flight that flew the ILS to check it and yes, it was operating properly.
Q And you don't know who flew that flight.
A No, sir, I don't, but it was done in conjunction with the NTSB man, Jim Wall and whoever his Mexican counterpart was at the Tijuana Airport.

* * * *

Q What is your opinion about the pilot's failure to follow the published instrument approach procedure for the ILS for runway 090?

A If the procedure is followed on any instruments, whether it's a precision approach or a not-precision approach, it will provide for a successful landing, provided weather conditions are at or above minimums.

Q And in your opinion, then, the pilot's failure to follow the instrument approach -- the ILS approach -- was a cause of the accident. Could you explain that opinion? Why do you hold that opinion?

A The ILS is -- and/or the precision approach generally forces the lowest landing minimums. I would have to qualify that because a PAR approach, for which there is no published PAR approach into Tijuana -- the lowest minimums for an approach into Tijuana are afforded by an ILS DME approach. So, that particular approach will give you the lowest minimums -- possible minimums.

If you fly the procedure correctly and you do have the minimums, we can virtually guarantee a successful landing. You have all the guidance on an ILS approach. You have guidance -- both vertical guidance and distance guidance from the approach end of the runway. So, you have a maximum compliment of indications, both in the cockpit -- to guarantee a successful landing.

Q Does the glide slope provide information about the elevation of the airplane above the terrain?

A Yes, it does.

Q If the pilot follows the glide slope during his approach to the airport, will the airplane remain at a safe distance above the terrain?

A Yes. If the pilot follows the projector [sic. "projected"] glide slope, the correct glide slope, yes, he will -- he's guaranteed terrain separation up to the master [sic. "missed"]

approach point.
Q Do you have an opinion as to whether the pilot of XAKOA at some point left the glide slope during his approach to the airport?
A Yes, I do.
Q What is your opinion concerning that?
A He obviously abandoned, for whatever reason, the electronic glide slope, per se. And he -- resulting in the crash -- the end result.

[Emphasis added.]

* * * *

[RT VIII 20:4 - 20:16]

Q What should the pilot have done if he reached the decision height and did not have the airport in sight? What should he have done at that point?
A The law specifically says -- and we've been trained -- all pilots have been trained to initiate a missed approach. And the procedure is enumerated or detailed on the same approach -- on all approach --
Q What is the decision height at Tijuana Airport? At what decision height on September 30, 1987, should the pilot have executed a missed approach if he did not have the airport in sight?
A On Exhibit 9, I show a decision height of 736 feet MSL, 250 feet AGL.

[Emphasis added.]

* * * *

[RT VIII 21:4 - 22:14]

Q So, assuming that the visibility was below minimums and assuming that the wreckage came to rest at least a mile away from the airport -- based on those facts, do you have an opinion as to whether the pilot could see the airport at the

time of the crash?
A Yes, I do. It is quite apparent, based on the weather reports, both at the station and surrounding facilities, that it was highly unlikely that he had ground contact -- and specifically, ground contact with the ground below the fog layer. He may have had ground contact with terrain sticking out above the fog. But, I find it highly unlikely that he made contact with the actual ground below the fog layer.
Q Do you find it unlikely that he would have had the visual range to be able to see the airport runway from the point where the wreckage impacted?
A Most probably not.
Q And do you have an opinion as to whether the pilot's -- an opinion to a reasonable probability as to whether the pilot's failure to execute a missed approach when he did not have the airport in sight was a cause of the accident?
A Yes. Most certainly the end results indicate that.
Q And what is your opinion in that regard? Could you explain what the pilot should have done at that point?
A In basic terms, for whatever reason, the fact that the aircraft crashed short of the runway -- short of the airport is tantamount proof that he did abandon the glide slope, whether it was -- and/or instructions by controllers given during the approach.

Now, what reasons he may have had to do so, I would not want to conjecture on. There are a considerable number of possibilities, none of which are justifiable, in my opinion.
Q Should he have executed a missed approach?
A Yes, sir.

[Emphasis added.]

* * * *

[RT VII 23:14 - 23:18]

Q Does the pilot have the right to execute a missed approach on his own prerogative at any time?
A That's correct. He can shoot a missed approach

during any phase of a landing approach, not necessarily at the missed approach point.

* * * *

[RT VIII 32:13 - 32:19]

Q Mr. Jaax, do you have an opinion to a reasonable probability as to what kind of approach the pilot was attempting to conduct?
A Yes. I think I stand by my earlier assertion that I believe and I would have expected him to be conducting an ILS DME approach to runway 09, with its applicable landing minimums.

* * * *

[RT VIII 38:16 - 40:22]

Q Mr. Jaax, would you tell us what facts you were relying on to determine your understanding of whether the pilot was current for IFR?
A On a review of the -- of both the tapes between ATC and the aircraft in question that were sent to me -- both the tapes, as well as the written translation of the tapes, in conjunction with a general review of the pilot's log book, with particular emphasis on this exposure -- instrument exposure or possible instrument exposure, total time, et cetera, operating environment. And I tried to relate it to this performance during all phases of contact with air traffic control -- from initial contact through the termination of flight, or you might say the crash of the aircraft. I tried to put it in -- somewhat into context.

I looked in particular at the procedural aspect of the pilot's conduct. I also looked at -- listened to the tapes, to the pauses in the tapes, and tried to combine all information that I had in my hand. And assuming it is the correct information, I reached an opinion. And the opinion was that

the pilot was rather minimally -- minimally qualified, but certainly lacking experience. And I found the procedures to be quite a bit removed from what you might consider standard instrument practice, as well as suggested practices in trade journals, et cetera, et cetera -- both the U. S. and Mexican, and different, to a large degree, from anything that I've ever experienced during an instrument approach or observed other pilots -- other procedures that other pilots used making the approach.

Q Did you form an opinion about the pilot's competency to conduct an instrument approach?

A Yes, I did. I thought that he was a rather incompetent pilot in respect to procedures or procedural requirements. He was -- I also found him somewhat lacking in the decision-making process. And subsequently, that is a reflection on his pilot-in-command abilities, in my opinion.

I found it quite an unusual approach from beginning to end, if I want to summarize it -- quite unusual.

. . . .

THE COURT: He said the pilot had minimum qualifications to fly under instrument flight rules and he was incompetent to fly the approach. Isn't that what you've testified?

THE WITNESS: That's exactly what I said, your Honor -- yes.

[Emphasis added.]

* * * *

[RT VIII 80:5- 80:25]

Q Do you have an opinion of whether, on the morning of September 30th, 1987, at 6:00 o'clock, when the pilot departed -- approximately 6:00 o'clock, when the pilot

departed from Guerrero Negro, whether he would have reasonably anticipated IFR conditions at Tijuana that morning at time of arrival?

A Reasonable anticipation? Well, if your question if he expected to have ground fog, per se, or low clouds -- the answer is yes. It is probably a time of the year where it's almost (indiscernible) and usually expect to have ground fog in the San Joaquin Valley during the month of November and December, and my answer to that is yes. I think more so than during other periods of the year, specific other periods of the year.

Q You're familiar with Tijuana Airport that time of the year, late September?

A Yes, not only that, but on the Baja coast in general, yes.

Q And in the early morning is fog quite common that time of the year?

A Yes. Yes, during that time of the year, yes.

[Emphasis added.]

* * * *

[RT VIII 90:13 - 91:9]

Q Whether he had a loss of engine power or not, Mr. Jaax, do you have an opinion as to whether pilot negligence was a cause of this accident?

A Pilot negligence -- I could only qualify -- what I could definitely qualify as negligence was the -- the fact that he descended below either decision height or minimum descent altitude. That would be a clear-cut act of negligence on the pilot's part barring some undiscovered structural failure per se -- something beyond the control of the pilot, which I did not see anywhere in the record.

(Pause.)

Q In Mexico, is it standard practice for a pilot to have the option to take a look at an airport, even if that pilot is piloting an air taxi carrying passengers?

A Yes, he is -- that is permissible.
Q In the United States, is it standard practice for a part 135 pilot, an air taxi pilot, to be able to commence an approach to an airport that has less than minimum visibility for an instrument landing?
A I -- I -- for standard practice -- or is it permissible? It's prohibited by law. It's not a matter of practice. Specifically prohibited by law.

[Emphasis added.]

* * * *

[RT VIII 95:7 - 95:11]

Q Do you have an opinion of whether failing to hold over the station until the weather improved was a cause of the accident?
A Yes, I think that's what I -- I think I -- I -- I tried to convey that.

* * * *

[RT VIII 114:20 - 115:4]

JAAX - CROSS

Q Now, did you say that this pilot received information pertaining to the Tijuana weather conditions at the time of his approach?
A Did I say it?
Q Did you say it? My notes aren't clear.
A Yes, I understood -- the tape that I reviewed -- the tape that I reviewed, considering it was -- I'm assuming that it was the tape, the actual tape of the conversations among the people involved -- indicated to me yes, that the controller gave him a weather report.

* * * *

[RT VIII 129:14 - 130:23]

THE COURT: I will ask another -- a summary question here. In stating your opinions, you have told us that you believe that the pilot in control of XAKOA on the morning of September 30th was negligent in the following: that he descended below the appropriate glide path on making the approach to runway 9, Tijuana Airport.

THE WITNESS: Yes. That's accurate.

THE COURT: That, under the then-conditions of visibility, the pilot attempted an approach either by using the localizer of the otherwise instrument approach which you have described you believed was the approach he probably made when a reasonable, prudent pilot under those conditions would not have made the approach to the runway 09 at Tijuana Airport.

THE WITNESS: That's essentially correct.

THE COURT: Tell me what may be incorrect about it. Have I misstated it?

THE WITNESS: No, your Honor. I think --

THE COURT: Are there any other -- are there any other bases of -- that you would find the pilot negligent at that time and occasion within a reasonable probability?

THE WITNESS: Any other factors?

THE COURT: Any other --

THE WITNESS: I think that's paramount to -- answers your question -- I think you're essentially correct. I think that --

THE COURT: Well, I just want to summarize your testimony, and that you found that either or both of these causes within a reasonable degree of probability contributed to the cause -- the crash of the aircraft approximately a few minutes before 8:00 o'clock on the morning of September 30th.

THE WITNESS: Yes, sir. I think that's --

THE COURT: All right.

THE WITNESS: Yes, sir. [Emphasis added.]

* * * *

[RT X 61:24 - 62:10]

TAYLOR - DIRECT

Q Did you form an opinion to a reasonable probability of whether the pilot was ever on the glide slope?
A I didn't extend the vertical measure of the glide slope out to the point where the pilot turned on to the center lined, but it would be my opinion that he probably -- I know the airplane was well below the glide slope at least from Alba inbound, or from his report at 2,500 feet or thereabouts. But I would conclude that the airplane was well below the glide slope throughout the entire episode, and most certainly at and immediately before impact, since the impact was below the level of the runway and the glide slope just doesn't go down there.

[Emphasis added.]

* * * *

[RT X 62:24 - 65:20]

Q What is the pilot responsible for in flying an ILS approach?
A In simplest terms, the pilot is expected to fly his aircraft so that it remains on the localizer, which is an electronic extension of the center line.
THE WITNESS: And, your Honor, it's that -- it looks like the shaft of an arrow or -- up there on the plan view. See the -- half of it's cross hatched? That's the electronic extension of the center line of the runway and if the -- it is displayed to the pilot in the form of a vertical indicator right in front of him, that moves to left or right as the airplane deviates once side or the other

from that center line.

His other responsibility is to maintain the aircraft on the glide slope, which does the same thing as a localizer, but turns 90 degrees, so that it provides a -- in this case, a three-degree slope right down to the runway. And -- and it followed all the way down. It typically intersects the runway surface at about 1,000 feet from the threshold. This is indicated to the pilot by horizontal bar or indicator of some sort that moves up and down and tells the pilot whether he is above or below the glide slopes.

The third area of responsibility would be the observation of what's know [sic. known] as the decision height. On every ILS approach, a pilot is authorized to fly on those two courses, vertical and horizontal guidance, down to an altitude on his altimeter which represents a certain number of feet above the ground. When he reaches that point in space, and it is always the same point in space if the pilot is on the glide slope and on the localizer -- in other words, the decision height is a published altitude on those two courses. When he reaches that point, he just make a decision -- this is one of the most aptly named terms in the whole business -- decision height -- he must make a decision whether to continue to a landing or execute the procedure known as a missed approach. In other words, add power, pull up, fly away from the ground -- and there's a published procedure to tell him what to do next.

So quite literally -- of course, there's a lot of -- of control manipulation and technique and power management and all that involved, but that's what a pilot must do. Stay on those two courses, fly on the localizer, on the glide slope, to a decision height. When he gets there, if he sees the runway and can land, he will. If he cannot see it, he is obliged to execute missed

approach.
BY MR. FOOR:
Q What is the decision height for this approach to Runway 090 -- the decision height that in effect on September 30th, 1987?
A For this particular airplane, that decision height is down here in the lower left-hand corner and it's 786 feet on his altimeter, which is related to feet above sea level. And then in parenthesis following that, that is 300 feet above the touchdown zone of the runway, the very threshold.
Q What was the minimum visibility for an instrument landing for XAKOA on September 30th, 1987?
A Because it was a non-scheduled flight, it falls into that box -- the same one I just pointed to, and the visibility was either 1,600 meters or one mile -- one statute mile. In other words, if he did not have -- if a pilot flying this approach did not have the runway lights or the runway itself in sight at that point, one mile out, then he could not legally continue to a landing.
Q Do you have an opinion as to a reasonable probability whether a pilot's failure to follow the glide slope was a cause of this accident?
A Oh, I think it was the cause of the accident. The crash occurred on the localizer, but obviously well below the glide slope.

[Emphasis added.]

* * * *

[RT X 72:14 - 73:3]

Q Do you have an opinion whether the altimeter setting was a factor in this case?
A I do.

Q What is that opinion?
A It was no factor.
Q Why not?
A I say it was no factor unless the pilot did in fact make a gross error in setting his altimeter. And I would be surprised to find that were the case, and it -- it just doesn't fly, because if the pilot remained on the glide slope, he would have crashed on the runway in this case. He would not have crashed a mile short and a hundred and some-odd feet below the level of the runway. So even with a missed altimeter, even with a malfunctioning altimeter, this accident scenario would not have occurred.

[Emphasis added.]

* * * *

[RT X 76:25 - 77:24]

Q Now, one question I have pertains to the distance. You mentioned distance -- that the localizer is the extended center line of the runway? Did you -- did you make an estimate of how far along the localizer the pilot was at some point during this approach?
A One of the radar-derived positions put him two and a half miles from Alba. Alba itself is 6.3 miles from the end of the runway, so that would put him at about at least eight and a half miles from the runway on the localizer, and of course, he had to turn to get onto the localizer, so my best estimate would be that when he intercepted the localizer -- when he turned eastbound toward the runway, he probably would have been on the order of 10 miles from the runway.
Q And is it your understanding that the localizer extends into the United States at that point?

A Oh, yes, indeed it does. It extends into the United States almost from the end of the runway.
Q So then at some point the pilot would have been about 10 miles inside the United States?
A Well, I don't know -- he wasn't 10 miles north of the border, he was -- he would have flown nine or 10 miles roughly in U.S. air space before he once again crossed the border into Mexico in the very final stages of the approach.

[Emphasis added.]

* * * *

[RT X 81:16 - 82:13]

Q Do you have an opinion to reasonable probability as to whether the pilot of XAKOA failed to execute a missed approach after reaching the decision height without the airport in sight?
A Yes, I do.
Q And what is that opinion?
A If he had executed a missed approach at decision height, even though he were below the glide slope at the -- at the time, he would have been 300 feet above the elevation of the runway, and therefore, more than that above the elevation of terrain into which he crashed. So if he had disregarded the guide slope indications totally -- if he had reached decision height, did not see the runway, which at that point was just impossible due to the fog -- if he had executed a missed approach at that point, just based on altitude, we wouldn't be here today, or not for this reason anyway.
Q Do you have an opinion to a reasonable probability as to whether failing to execute a missed approach after reaching decision height without the airport in sight, was the cause of the accident?

A Yes, in that that situation is rather descriptive of flying the airplane at a dangerously low altitude, yes.

* * * *

[RT X 88:6 - 88:23]

Q Do you have an opinion to reasonable probability as to whether Raul Gutierrez was qualified to act as pilot in command of this flight, if it was an IFR flight?
A If the pilot or the person who dispatched this pilot were aware of the probability of IFR conditions at Tijuana on that morning, then the pilot's qualifications would have not been there and he should not have been sent on this flight. I think this is doubly important because of the paucity of alternate courses of action in a flight like this. There really was only one other place to go, and that's Mexicali, and if Mexicali were not suitable to complete the mission as dispatched, then it -- it should never have been sent. But -- but this pilot, to the best of my knowledge, and in my opinion, not being an instrument-qualified pilot, didn't stand the chance, if in fact it was going to be IFR when he arrived at Tijuana, much less if visibility were such that he could not reasonably complete this instrument approach.

[Emphasis added.]

* * * *

[RT X 91:13 - 92:6]

Q Mr. Taylor, I'd like to place before you a document that's been marked and entered in evidence as -- it's -- in this matter -- page three, and this is a terminal forecast for Tijuana airport, abbreviated TIJ, for 11:00 p.m. the night before the flight, 600 hours

Zulu would be 11:00 o'clock at night the night before. Could you tell us whether this forecast where it says, "Temporarily -- ceiling 1,000, two miles, fog and haze" -- whether that is an IFR weather forecast?

A Yes, indeed, it is.

(Pause.)

Q So do you have an opinion then as to whether if the pilot had the latest forecast for Tijuana Airport at 11:00 o'clock at night the night before the flight, whether the pilot would have known that the weather conditions would be IFR the next morning?

A Well, he doesn't know that they would be, but he is put on notice that that is a very strong possibility, if not a probability . . .

[Emphasis added.]

* * * *

[RT X 118:18 - 118:24]

TAYLOR - CROSS

Q All right. Well, didn't you testify in this courtroom that Mr. Gutierrez had duty to determine the weather prior to his departure from Guerrero Negro?

A I did, and if Mr. Gutierrez had utilized the same sort of information that I had -- forecasts, and applied his knowledge to it, I think he would have come up with a probability of fog.

[Emphasis added.]

* * * *

[RT X 119:12 - 119:25]

Q What does the time of day have to do with

whether or not he should check prior to departure?
A Fog historically occurs after a clear night, early in the morning hours at and shortly after sunrise.
Q Have you any substantial or reasonable basis for assuming that that is indeed the pattern here in Baja, California during the mont of September of 1987?
A The month of September has nothing to do with it. The Tijuana/San Diego area has nothing to do with it. Coast -- low lying coastal areas are by definition, located in close proximity to large bodies of water, providing the moisture necessary which when moved over cooler land, turns into fog. This is something that we teach pilots from day one of basic meteorology.

* * * *

[RT X 121:12 - 122:13]

Q What I'm getting to is, based on Mr. Foor's own expert meteorologist, the three days next preceding the accident -- the pattern of visibility at Tijuana at 8:00 a.m. in the morning was well in excess of five miles of visibility. So can you tell us why in light of that pattern -- that evidence -- you've taken it upon yourself to assume that this pilot should have foreseen fog on September 30th?
A I can, especially in light of the fact that the night before was a very clear night. In that case, the radiation of heat from the earth increases rather remarkably and again when put in the context of a low lying coastal plane, with an on-shore wind flow and very little difference between temperature and dew point, pilots are taught from day one to expect the formation of fog. If it doesn't form, wonderful. But what if it does?
Q Well, just a minute, sir.
A A pilot can't rely on what has happened the last

several nights.

Q Well, just a minute. Let's take your thesis, if we may, or premise or whatever you choose to call it. You're saying because the night before it was clear, the pilot should have assumed that the next day would be foggy?

A Not necessarily. The pilot should have been aware of the probability of fog formation following an evening like that. It's a classic fog producer. Pilots are taught that.

* * * *

[RT X 123:9 - 125:5]

Q Given this pattern, you still believe, sir, that the pilot should have foreseen fog at 8:00 a.m. on the morning --

A He should have foreseen the possibility of fog, yes, particularly since he appears to have not been qualified to fly on instruments, and particularly since this flight involves over 300 miles with only one alternate course of action open to him.

Q So you're telling his Honor that not withstanding the pattern of at least the three days before of an absence of fog, the pilot should have seen -- he should have foreseen fog; is that right?

A Absolutely.

Q All right. Now, you're very, very clear on your testimony in that regard; is that right?

A I don't think I could be any clearer.

Q I agree. Now, I want you to tell us if you would, sir, what education and experience in weather forecasting and weather observations do you have that entitles you to make that type of a statement?

A For about the third time, I'm saying to you that

the conditions that existed in Tijuana that morning were the classic fog producers that we teach pilots from the very beginning. You don't have to be a forecaster. You don't have to have a lot of experience as an observer. We teach pilots that these are the conditions that will probably very likely produce fog, and to be aware of them and to take whatever precautions need to be taken to do whatever else might need to be done, if in fact fog forms. If it doesn't form, thank you, Mother Nature. No -- you know, nothing else to worry about. But if it does form, now, I've got a concern about it.

(Pause.)

Q One -- one more time. What education and experience do you have that entitles you to offer opinions on the extent to which prior weather conditions are necessarily indicative of fog the following day? Do you have any training as a meteorologist?

A Again, I go back to my position as a pilot expert which I explained early on, encompasses basic meteorology. This is taught in every weather course that any pilot has ever attended. So my experience, my training has been in numerous such courses in the military, numerous such courses in the civilian aviation community and the fact that I taught those things and therefore had to become aware of them. I've read and studied and looked at books and talked to meteorologists.

[Emphasis added.]

* * * *

[RT X 142:19 - 143:7]

Q All right.

A As far as this regulation goes, it is possible that this pilot qualified under this regulation. As far as this

pilot's ability to successfully prosecute or -- excuse me, execute an instrument approach procedure, there is nothing that indicates to me that he had that capability.
Q I understand that, sir, but I wasn't talking about your views as to his overall competence. If you could try to keep my question in mind, what I was asking you about is your opinion that he had violated a certain Mexican aviation regulation. This Defense Exhibit SS2 does not speak to generalized competence, does it?
A No, we're talking about instrument competence.

[Emphasis added.]

* * * *

[RT X 144:14 - 145:1]

THE COURT: I'd like to leave this point by saying this: that this witness has testified that it's possible that this pilot qualified under the regulations of the Republic of Mexico, but in looking to his actual competency, the witness says that he's not competent to conduct a IFR approach.

Isn't that the substance of what you told us?

THE WITNESS: Yes, sir. Demonstrated --

THE COURT: All right.

THE WITNESS: -- very clearly to us.

THE COURT: The certification and the authorization can lead to one side -- he's talking about competency.

[Emphasis added.]

* * * *

[RT X 145:21 - 145:23]

Q Now, you said the pilot, in your view, was not competent, correct?
A That's correct.

* * * *

[RT X 147:7 - 148:6]

Q All right, then let's focus on that moment here. What is it about the moment here that leads you to conclude with such certainty that this pilot was incompetent?
A The very fact of the way that he -- the instrument procedure was executed.
Q In other words, the mere fact that the pilot failed to follow the glide slope?
A That I would say is the most glaring demonstration of the lack of competency, yes.
Q Do you know that the pilot --
A Plus -- excuse me, plus the pilot -- plus, the pilot failed to observe one of the -- if you'll pardon me, the bottom lines of an operation such as this. If -- a pilot has surely got to know when he commences an approach like this, what his minimum altitude is. He's got to have a mental picture of what the altimeter is going to look like when he gets there. He's got to watch it under the lining and decide when he is there. Going below that altitude, which is only 300 feet above the runway in this case -- going below that altitude with no visual contact is one thing. Going down to the published altitude of the runway is something else, and flying the airplane to an altitude even below the level of the ground on the landing surface is almost unbelievable.

* * * *

[RT X 180:12 - 180:23]

MR. GRECO: All right. I'd like to read for the record, your Honor, page 126, lines 11 through 20.

> "Answer: May I state for the record, though, that the tower makes no weather observation. Those observations are being made downstairs by the people that elaborate that form. Approach had absolutely no way to look outside to say what the weather was like, except upon a weather report transmittal from the weather reporting station."

* * * *

[RT X 216:17 - 217:1]

Q Let me ask you, sir, had you previously discussed with Mr. Foor the extent to which Tijuana Air Traffic Control caused or contributed to the pilot --

A Yes, we discussed that.

Q What discussions have you had about it?

A That was brought up as one of the possible considerations in this case and I assured Mr. Foor from the very beginning -- the first time it was mentioned, that in my opinion, the air traffic controller had nothing to do with the cause of this crash. Absolutely nothing.

[Emphasis added.]

* * * *

[RT XVIII, March 8, 1993, 51:4 - 51:20]

Defendant's Closing Argument

THE COURT: All right. When I decide -- I'm probably going to decide on all issues. Regardless of how I find on liability, I will probably make findings on the damages as well. I'm going to make findings on all of the issues that were tendered in this case because it's been a long time coming here to trial, and I want to put it in a position -- no matter how I decide that they -- if they ultimately say I'm right or wrong or if they don't think I'm wrong and correct it, if it gets -- of simply adopting -- if I should find against Mr. Foor's clients -- I'll have findings on damages, they can just say (indiscernible). So I'll let you argue everything in this case. I'm not raising these issues. I'm not saying to you exactly what I'm going to do in this case, but I recognize that -- and I recognized in the beginning that there were circumstances in this case that sort of narrowed the choices that you could make as a defense attorney.

[Emphasis added.]

* * * *

[RT XVIII, March 8, 1993, 54:23 - 60:8]

THE COURT: Let me put this to you. There is not much doubt is there that Mr. Matsushita was an agent of Exportadora in negotiating or making arrangements for the Japanese visitors, is there?

MR. GRECO: I would hesitate to go that far and say that he was an agent for Exportadora. He may have been acting as an agent for them --

THE COURT: Certainly they sent -- Exportadora sent Telexes to him and for instance, knew

to ask him for information concerning the agricultural project and Matsushita responds to this, so --

MR. GRECO: He was in the loop.

THE COURT: Right, and --

MR. GRECO: Clearly.

THE COURT: But he's the one that communicates with the Japanese visitors, and we don't really know perhaps the terms -- the way that he communicated with the Japanese visitors or how they communicated with him. But we do know that there were some agreements arrived at. We knew that those -- at least the principal terms of the agreements that had to do with when Mr. Omachi and Mr. Sugimoto, and Mr. Kodani would arrive at Tijuana -- would arrive in San Diego, and when they expected to return. And we do know because we have -- some Telexes that we do have the schedules -- the schedules have been made up by Mr. Pellegrino for the -- we do know that there was an agreement to provide beyond San Diego transportation and accommodations for the Japanese visitors. That's not in dispute, is it?

MR. GRECO: I don't dispute that, your Honor. What I have a great deal of trouble with is the suggestion that Exportadora or its counsel, whether it was this counsel or past counsel, somehow withheld documents, that's not my practice.

THE COURT: Oh, I --

MR. GRECO: And that's what he's saying.

THE COURT: What I'm saying is we -- I'm looking at what was the agreement, and there isn't much dispute really as to what the agreement was. Regardless of that we don't have a communication from Matsushita to Sugimoto, Kodani or Omachi.

MR. GRECO: There was -- there is not any dispute in my mind but what -- the fact that there was an agreement, and what some of the essential terms

were, but in his closing arguments he states that there were definitely -- or words to that effect -- was a promise for round trip travel on the company airplane. That's not my understanding of the agreement, and certainly the evidence didn't show that.

THE COURT: We had a little trouble with that -- did you look at the schedules? Because they did schedule them on Westwind and they were round trip.

MR. GRECO: That was -- there was an internal document, but the fact that there's a scheduling -- there's no evidence to suggest that it was concurrent with the scheduling or prior to it. A promise to either or any one of the decedents for round trip transportation.

THE COURT: Well, would you look at that -- what evidence did you have, such as what's in the Telex, what's in the schedule -- to decide or infer what the agreements were. There really is not a lot of argument, is there? Because the schedules were provided for two weeks ahead, and they came out every week. But we do know that the scheduled return was on Westwind.

MR. GRECO: We did know that.

THE COURT: Okay. And so we could say that at least within the contemplation of both Exportadora and the Japanese visitors they were going to be returned on the Westwind -- on September 30th when it left Guerrara Negro to Tijuana.

MR. GRECO: I can say that based on the internal documents I've seen that was within the contemplation of Exportadora.

THE COURT: And isn't this the best evidence of what the agreement was?

MR. GRECO: Not necessarily. I don't know what was --

THE COURT: Just tell me what other evidence --

MR. GRECO: Well, you have Telexes, your Honor, incoming from Matsushita saying, "Arrange transportation by company plane/car, by pickup truck/company plane". I mean that to me is also evidence that there was nothing set in concrete.

THE COURT: No, but what they -- what Exportadora did was in the scheduling, and they put it on their schedules, and that's the only to schedule it, isn't it?

MR. GRECO: No, there is no doubt that there was this internal scheduling. In fact, the testimony I think from Exportadora's own representatives was that if the company plane was available that the people would be returned on the company plane.

THE COURT: Well, tell me how they were going to get Omachi back to -- on September 30th at 12:50 to LAX and a trip to Guerrero Negro unless they did schedule it as they did.

MR. GRECO: Scheduling him on the company airplane?

THE COURT: As they did.

MR. GRECO: Well --

THE COURT: Well, I mean there is no way he's coming up by car on the morning of September 30th --

MR. GRECO: The way they would have got him up here is the way that was contemplated on the air taxi. It didn't have to be the company airplane to get him back up to Tijuana. At least, there is no evidence --

THE COURT: It's a nine-hour trip, I thought, from --

MR. GRECO: No, no, I'm suggesting that it did not have to be the company airplane that took him.

THE COURT: No, it didn't have to be the company airplane. It wasn't in this case because they

did --

MR. GRECO: Well, certainly not a car or a bus. I understand that. But I'm not sure that there is any evidence that suggested Exportadora knew prior to the time that Mr. Omachi came to Guerrero Negro that he had to be back by 8:00 a.m. -- or I'm sorry -- that he had to be in LA by 12:15.

THE COURT: Well, why did they schedule him on that morning flight?

MR. GRECO: I don't know, your Honor, what was told --

THE COURT: Because that's the only evidence of when he was scheduled, isn't it?

MR. GRECO: Yes.

THE COURT: And when Matsushita communicates with him by Telex. Hasn't he pointed that out, he's saying, "You'll arrive at San Diego but he has to get back at 12:00 so he can catch the flight from LAX"?

MR. GRECO: That's correct, but again what I'm saying is if we are looking for proof by a preponderance of an agreement that there ought to be some proof, some testimony, some something that demonstrates that there was this alleged promise to transport these decedents round trip on the company airplane, and to my knowledge that evidence does not exist. If the Court's apt to engage in inference and the like, then perhaps one could do that, but --

THE COURT: But inference is perfectly legitimate in determining what is probability or not.

[Emphasis added.]

* * * *

"Even more destructive of plaintiffs' contrived res ipsa loquitur theory is the fact that such a theory rarely applies, if ever where the transporter is not acting as a common carrier. That is, plaintiffs suggest that an "inference of negligence" arises, by operation of the doctrine of res ipsa loquitur, "where a passenger on a common carrier is injured." [Footnote omitted.] However, unhappily for plaintiffs, Aviones was not acting as a common carrier on the specific flight here involved. Rather, under prevailing decisional law, Aviones acted as a private carrier, when conducting the September 30, 1987 flight.

Generally speaking, Aviones is, and was, a national air taxi company and 'a Mexican common carrier'. [Footnote 40: Notably, the Pre-Trial Order does not characterize Aviones as a common carrier for the specific flight here involved.] However, where, as here, a common carrier contracts to provide a special flight or service for a specific person or group of persons, that carrier acts as a private carrier. In that regard, the following holding is instructive:

'The current status of the law seems clearly to be that when a common carrier contracts to render a special service for a group of individuals or a public agency it thereupon becomes a private carrier. Such is the law as declared in a host of authorities from the United States Supreme Court and from many federal and state courts. [Citations and block quotations omitted.] . . . . when the common carrier is 'acting outside the performance of its duty as a common carrier.' In such event, it deals with 'matters involving ordinary considerations of contractual relation' and is acting as 'merely a private carrier in respect to the plaintiff, [and owes] him merely the duty of ordinary

care.' Hopkins v. Yellow Cab, 114 Cal.App.2d 394, 397-398 (1952). [Emphasis added.]

In short, to the extent that plaintiffs rely on common carrier status to invoke the res ipsa loquitur doctrine, they cannot properly do so because under the specific circumstances here involved Aviones was acting as a private carrier." Exportadora's Reply to Plaintiffs' Post-Trial Brief, served March 1, 1993, p. 37:5-38:18. Case no. 88-1532, CT 276, 37:5-38:18. [Emphasis added.]

(5)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,
Petitioner,

v.

HIROKO SUGIMOTO, et al.,
Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

Amicus curiae adopts the questions presented for review as they appear in the petition for a writ of certiorari filed by Exportadora de Sal, S.A. de C.V. (Exportadora), with the following addition:

Whether an agreement between the Government of Mexico and the Government of Japan for technical cooperation, which requires Mexico, when receiving scientists, to provide transportation and accommodations, makes the provision of such transportation under the direction of Mexico "public" acts that are immune from jurisdiction in the United States?

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BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the United Mexican States (Mexico) respectfully submits this brief amicus curiae in support of the petition for a writ of certiorari filed by Exportadora. Consent to the filing of this brief has been granted by counsel for both parties. Copies of the letters of consent have been lodged with the Clerk of this Court as part of Mexico's Appendix.

Mexico is the majority shareholder of Exportadora. The respondents are all Japanese citizens, and are the survivors of three passengers who died in an aircrash which led to this wrongful death action. Exportadora is a foreign sovereign under the Foreign Sovereign Immunities Act of 1976 (FSIA) (28 U.S.C. §§ 1330, 1603 et seq.), and, as such, is presumptively immune from jurisdiction in the United States unless one of the exceptions to immunity applies.

Jurisdiction originally was challenged by Exportadora in response to the complaint. The motion to dismiss was denied, and Exportadora timely filed an interlocutory appeal with the Ninth Circuit under the collateral order doctrine. The court of appeals held that jurisdiction existed under the "commercial activities" exception of the FSIA (28 U.S.C. § 1605(a)(2)) and affirmed the district court's denial of Exportadora's motion to dismiss. Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777 (9th Cir. 1991) (Schoenberg).

The case proceeded to trial with only the survivors of the Japanese passengers, Sugimoto, Kodani and Omachi, after two of the plaintiff groups who are the survivors of the two California passengers settled their claims. Following trial, judgment was entered against Exportadora, leading to the second appeal. Again, the Ninth Circuit found jurisdiction under the commercial

activities exception, this time on a different basis. Sugimoto v. Exportadora de Sal, S.A. de C.V., 19 F.3d 1309 (9th Cir. 1994) (Sugimoto).

Under Article 28 of the Mexican Constitution, the profits which the Mexican government derives from Exportadora's operation belong to the people of Mexico. Mexico assert's the right of its people to determine how these public resources are to be spent.

Mexico also is a member of the family of nations and as such has an interest in upholding international law. Mexico firmly believes that its departments and public corporations should not be subject to the jurisdiction of United States courts except under principles consistent with customary international law. Mexico respectfully submits that the Ninth Circuit has carved out a new exception to the principle of sovereign immunity which is not consistent with international law as codified in the FSIA.

The Ninth Circuit has created this new exception by grafting tort principles, in particular those of vicarious liability, onto the commercial activities exception, (28 U.S.C. 1602(a)(2)), with the extraordinary result of finding a Mexican public corporation vicariously liable for the tortious conduct of a private corporation solely because of remotely related and relatively insignificant commercial activity in this country.

Mexico believes the Ninth Circuit's imputation of jurisdiction based on a finding of vicarious liability erodes one of the primary purposes of the FSIA, which was to establish a uniform body of law needed because of the potential sensitivity of actions against foreign sovereigns. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), citing House Report No. 94-1487, p.32 (1976). The Ninth Circuit's approach requires courts to first

determine liability before jurisdiction can be considered, contrary to the FSIA which states that liability is considered only in instances where the foreign state is not entitled to immunity. 28 U.S.C. §1606.

Perhaps most important, Mexico finds the circumstances of this case prevented the introduction of evidence that would conclusively establish Exportadora was engaged in immune "public" activity, not commercial activity, as to two of the three passengers. The passengers were being transported by Exportadora at the instruction of the Government of Mexico, which instruction was made pursuant to an agreement between Mexico and Japan pledging technical cooperation between the governments and, complimentary travel and accommodations for Japanese experts while in Mexico. The agreement was signed on December 2, 1986, in Tokyo and was published in Mexico's federal register ("Diario Oficial") on April 25, 1988.

Although Exportadora argued that it had been directed to transport the scientists on behalf of Mexico when its original motion to dismiss in Schoenberg was denied, the formal agreement was not known to Exportadora at the time. However, Exportadora was later deprived of the opportunity to introduce the agreement at trial in Sugimoto, because the district court refused to revisit jurisdictional issues.

Finally, Mexico submits that the Ninth Circuit applied American concepts of insurance and liability to a Mexican corporation, which could not have insured itself against this risk in Mexico. Part of the Ninth Circuit's finding of vicarious liability was based on the holding that "the enterprise...is free to insist upon [a contractor] who is financially responsible, and to demand indemnity from him." Sugimoto, 19 F.3d at 1312. Amicus informs this Court that Aviones carried the insurance required by Mexican law, and paid benefits to some of

the same plaintiffs who have sought additional compensation in the courts of this country. These considerations have no application to a Mexican public corporation which could not have insisted on a carrier having more financial responsibility than Aviones. Mexico respectfully finds the Ninth Circuit's comments insensitive to the laws of a sovereign nation.

Because of the foregoing interests and concerns, Mexico believes that Exportadora was improperly subjected to jurisdiction in the United States, and that the case properly should have been brought in Mexico.

SUMMARY OF ARGUMENT

The FSIA provides the exclusive means for acquiring jurisdiction over foreign sovereigns in United States courts. An exception to the immunity presumed by the FSIA is necessary for both personal and subject matter jurisdiction.

In initially challenging jurisdiction, Exportadora argued that transporting two scientists from Japan at the instruction of the Government of Mexico was a public act outside the commercial activities exception. The district court and the Ninth Circuit on Exportadora's interlocutory appeal disagreed, and held that Exportadora was appeasing its majority shareholder, which the courts found not to be an inherently public act.

After the interlocutory appeal but before trial, Exportadora learned of an agreement that had been entered into between Japan and Mexico. The agreement requires Mexico to provide transportation for experts from Japan while in Mexico to conduct studies. Mexico submits that Exportadora's activities in transporting the Japanese experts is immune "public" activity.

Mexico further submits that the Ninth Circuit's subsequent decision in Sugimoto is inconsistent with this Court's recent opinion in Saudi Arabia v. Nelson, _U.S._, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) and with the Third Circuit's opinion in Federal Ins. Co. v. Richard I. Rubin & Co., 12 F.3d 1270 (3d Cir. 1993). Those cases explain that courts must consider whether a plaintiff's claims are "based upon" the commercial activity asserted as the basis for jurisdiction. In Nelson, this Court reasoned that the defendants' tortious conduct itself failed to qualify as commercial activity.

Mexico respectfully believes the Ninth Circuit in Sugimoto also improperly created a new exception to immunity by basing jurisdiction on the acts of an independent contractor (i.e., Aviones), which were attributed to Exportadora. This Court in First Nat. City Bank v. Banco Para El Com., 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) discouraged such an approach to jurisdiction explaining that separate legal personalities are "an almost indispensable aspect of the public corporations."

Finally, this case provides the Supreme Court with an opportunity to define the "substantial contact" element of the FSIA's commercial activity exception. In Nelson, the Court expressly left the question for another day.

ARGUMENT

In considering immunity of foreign states, this Court explained that "subject-matter jurisdiction of the lower federal courts is determined by Congress, 'in the exact degrees and character which to Congress may deem proper for the public good.'" Argentine Republic v. Amerada Hess, 488 U.S. 428, 433, 109 S.Ct. 683, 102 L.Ed.2d 818, 827 (1989), quoting Cary v. Curtis, 3 How. 236, 245, 11 L.Ed.2d 576 (1845). The FSIA provides the exclusive standards for resolving immunity

questions raised by sovereigns in United States courts. House Report No. 94-1487, reprinted in 1976 U.S. Code Cong. and Admin. News, p.12. (House Report).

The FSIA codifies the "restrictive theory" of immunity, under which foreign sovereigns are absolutely immune from liability for suits involving public acts, but not those involving the foreign state's commercial activity. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983).

I. THE FSIA GRANTS IMMUNITY TO SOVEREIGNS ENGAGED IN PUBLIC ACTIVITY

In analyzing immunity since the adoption of the FSIA, courts first determine whether the foreign sovereign's activity was public or commercial. A state engages in commercial activity only where it acts as a private person in the market and exercises powers that also can be exercised by a private person. Saudi Arabia v. Nelson, 507 U.S. __, 60, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993).

In this case, Exportadora's activity as to Sugimoto and Kodani can best be described as transporting scientists at the direction of the government to fulfill Mexico's agreement with Japan concerning technical cooperation. The activity is not commercial because private persons do not undertake to transport foreign scientists to fulfill an international agreement.

The Ninth Circuit in Schoenberg, however, reasoned that an activity is public and noncommercial if only a sovereign state can perform it and that the activity is commercial if it is of the type customarily carried on by an individual for profit. Schoenberg, 930 F.2d. at 780. The Schoenberg court then concluded:

> Exportadora arranged transportation for [Sugimoto and Kodani] at the behest of its majority stockholder, the Mexican government. Appeasing one's majority stockholder is an activity that a private entity can perform...

Id. In reaching its conclusion, the Schoenberg court relied on the elusive test that the commercial character of an activity is determined by reference to the *nature* of the conduct and not to its *purpose*. Id. Although the court acknowledged the scientists had a public purpose at their destination, that was found to be irrelevant, and instead the court focused on the transportation and found it to be commercial in nature.

Mexico starts with the proposition that it, most certainly, would not have been engaged in commercial activity had it transported the scientists itself, because both the nature and purpose of its activity would have been public. Mexico would have been providing transportation to scientists pursuant to a formal agreement with Japan. It naturally follows that Exportadora was not engaged in commercial activity when it fulfilled the government's public obligation when directed to do so. Cf. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980).

Mexico believes the Ninth Circuit's opposite conclusion resulted, in part, from the difficulty courts face in distinguishing the *purpose* of an activity from its *nature*. The Supreme Court has recognized the problem, but acknowledged that the FSIA commands courts to observe the distinction. Saudi Arabia v. Nelson, 507 U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993); Republic of Argentina v. Weltover, 504 U.S. ___, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992).

In grappling with this issue, the Court in Weltover offered direction by explaining that:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are of the *type* of actions by which a private party engages in "trade and traffic or commerce [cites]."

Id., 119 L.Ed. at 405 (emphasis in original).

The Ninth Circuit's reasoning in Schoenberg conflicts directly with Nelson and Weltover. As quoted above, the Schoenberg court stated that an activity is public if it is one that only a sovereign state can perform, and that it is commercial if it is of the type an individual would carry on for profit. Schoenberg, 930 F.2d at 780. The Supreme Court, on the other hand, held that the question is not whether the sovereign is acting with a profit motive or to fulfill a uniquely sovereign objective.

In applying instead the Supreme Court's test, Mexico submits that Exportadora's transportation of the scientists to satisfy Mexico's obligation under an international agreement, is not the type of action by which private parties engage in trade and traffic or commerce. Private parties do not provide air transportation to scientists who happen to be conducting experiments on adjacent property.

Mexico urges the Supreme Court to address, as well, what Mexico perceives as an inclination by some courts to treat foreign government-owned corporations as commercial businesses for all purposes.

Public enterprises are essential to developing countries. Justice O'Connor explained in a different context, that public entities in the form of development

corporations are essential to economic progress in underdeveloped countries. First Nat. City Bank v. Banco Para El Com., 462 U.S. 611, 625, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983) (Bancec). As Bancec notes, in more desperate times, the U.S. also relied on public corporations such as the Tennessee Valley Authority.

While Exportadora might be one of the world's largest salt producers, a point of questionable relevance that plaintiffs' counsel repeatedly raises, it also is part of an economy that cannot absorb damages such as those allowable in a dynamic economy like California's. If Mexico is to prosper and to generate an economy that will encourage more of its citizens to remain at home and not seek a better life enjoyed in the United States, a now politically-charged issue, Mexico's definition of appropriate governmental activity should be respected. Mexico believes that the characterization of Exportadora's activity as commercial usurps Mexico's right to determine for itself how best to fulfill its international agreements entered to promote the common good of its people.

The Agreement of Technical Cooperation entered between Mexico and Japan should eliminate any doubt that Exportadora's activity as to Sugimoto and Kodani was public. Exportadora should have been allowed the opportunity to introduce this evidence at trial.[1] Regardless, Mexico asks the Supreme Court to take judicial notice of the agreement, an authenticated copy of

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[1]Subject matter jurisdiction over Exportadora turns on the existence of an exception to sovereign immunity. Verlinden, 461 U.S. 480, 493-494 & fn. 20. Objections to subject matter jurisdiction may be raised at any stage of the proceedings, including in the Supreme Court. See, e.g., Sosna v. State of Iowa, 419 U.S. 393, 395-396 & fn. 2, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). An issue not addressed below, even if not of a jurisdictional nature, may also be addressed by the Supreme Court when it involves national policy concerning foreign relations. Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 407-408, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

which is included in Mexico's Appendix to Brief of Amicus Curiae.

II. THE SUPREME COURT SHOULD TAKE JUDICIAL NOTICE OF MEXICO'S RECORDS OR REMAND THE CASE

Counsel has not located any case on appeal from a circuit court where the Supreme Court has taken judicial notice of a foreign statute. However, in a case on appeal from a state court, the Supreme Court took judicial notice of a declaration of Russia's Commissariat for Justice. U.S. v. Pink, 315 U.S. 203, 217-221, 62 S.Ct. 552, 86 L.Ed. 796 (1941). The Court considered the official declaration because it could take the same judicial notice available to the state court pursuant to a provision of the New York Civil Practice Act which allowed judicial notice of foreign law at any stage of the proceedings. Id. at 220-221. Both the Federal Rules of Civil Procedure (Rule 44.1) and the California Code of Evidence (§§ 452(f) & 453) have similar statutes.

Rule 44.1 allows a district court determining foreign law to consider any relevant material or source, whether submitted by a party or admissible under the Federal Rules of Evidence, as long as the party gives reasonable notice in writing. The written notice need not be in the pleadings and may be given at any stage in the proceeding. Notes Of Advisory Committee On Rule of Civil Procedure 44.1. Judicial notice has been permitted by this Rule in a number of cases[2], even when the issue

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[2] See, e.g., In the Matter of Fotochrome, Inc., 377 F.Supp. 26, 29 (E.D. N.Y. 1974), aff'd., 517 F.2d 512 (2nd Cir. 1975)(Japanese Code of Civil Procedure); Mongold v. Commissioner, 43 T.C.M. (CCH) 117, T.C. Memo 1981-715; T.C. Mem. (P-H) 810715 (United States Tax Court 1981)(Mexican criminal code); Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493, 497 (5th Cir. 1973)(unauthenticated Mexican civil code).

of foreign law arose after trial or on appeal.[3]

Without Rule 44.1, the Supreme Court also has consistently used judicial notice to consider federal and state statutes and administrative rules and regulations, even when they were not relied on at trial.[4] The Supreme Court has consulted Mexican archives *sua sponte* to settle land disputes. Romero v. The United States, 68 U.S. 721, 1 Wall 721, 17 L.Ed 627 (1864). Mexico requests that if the Court does not take judicial notice of the agreement, it should remand this case to the district court for judicial notice under Rule 44.1.

III. PLAINTIFFS' CLAIMS ARE NOT BASED UPON EXPORTADORA'S COMMERCIAL ACTIVITY IN THE UNITED STATES

The third Japanese passenger on the Aviones flight, Omachi, was a purchasing agent for Asahi Chemical Company of Japan, who had asked permission to visit Exportadora's facility.

Because Exportadora was not engaged in any public activity as to Omachi, Exportadora's immunity also must be evaluated in the context of th ommercial activities exception alleged by plaintiffs as the basis of jurisdiction. See, 28 U.S.C. § 1605(a)(2). That section states:

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[3] .See, e.g., Mila v. District Director Of Denver Colorado District of the INS, 494 F.Supp. 998, 999 (D. Utah, C.D. 1980), rev'd. on other grnds., 678 F.2d 623 (10th Cir. 1982), cert. den., 459 U.S. 1104, 1035 S.Ct. 726, 74 L.Ed.2d 952 (1983) (the adoption laws of the island of Tonga although they were not before the Board of Immigration Appeals hearing below); Curtis v. Beatrice Foods Co., 481 F.Supp. 1275, 1285 (S.D. N.Y. 1980)(the Columbian Labor Code although materials were not presented until after trial).

[4] See, e.g., Lilly v. Grand Trunk Western Railroad Company, 317 U.S. 481, 488-489, 63 S.Ct. 347, 87 L.Ed. 411 (1943); Fourth National Bank Of The City Of New York v. Francklyn, 120 U.S. 747, 751, 75 S.Ct. 757, 30 L.Ed. 825 (1887).

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --
>
> * * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; ...

Mexico finds it significant that two panels of the Ninth Circuit in analyzing plaintiffs' complaints arrived at different conclusions as to the basis alleged for jurisdiction -- even though both panels were evaluating the allegations in the context of the same exception to immunity. The Schoenberg court held that arranging transportation for the passengers through Exportadora's San Diego office was the relevant activity for jurisdictional purposes of plaintiffs' tort claims.

After the trial and before briefing commenced in the Sugimoto appeal, this Court issued its opinion in Saudi Arabia v. Nelson, 507 U.S. ___, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). In Nelson, this Court explained that a plaintiff's claim must be directly "based upon" the commercial activity alleged for the exception to immunity to apply. The opinion clarifies that the commercial activity alleged as the basis for jurisdiction under the FSIA, must include "those elements of a claim that, if proven, would entitle a plaintiff to relief." Id. 123 L.Ed.2d at 59.

Because plaintiffs' wrongful death claim is not based upon the arrangement of transportation through Exportadora's San Diego office, jurisdiction was raised again in the Sugimoto appeal. Instead of directing that the case be dismissed because plaintiffs' claims are not based upon the commercial activity as found by the Schoenberg court on the previous appeal, the Ninth Circuit in Sugimoto held that "Exportadora was engaged in commercial activity in the United States when the air

taxi flew in United States airspace ..." Sugimoto, 19 F.3d at 1311. By basing jurisdiction on a ground that was never addressed in the district court, the Ninth Circuit found jurisdiction over Exportadora.

This holding is erroneous and should be reversed. First, the plaintiffs never alleged that jurisdiction arose from Aviones' brief flight into United States airspace. Second, as discussed below, the Ninth Circuit's analysis of the relevant commercial activity is at odds with this Court's opinion in Nelson. Finally, as further discussed below, jurisdiction was exerted over Exportadora only because the Sugimoto court first imputed Aviones' negligence to Exportadora. This is the first known case where the commercial activities of a third party have been attributed to a foreign sovereign as a basis for jurisdiction under the commercial activities exception.

A. Plaintiffs' Tort Claims Do Not Support Jurisdiction Under the Commercial Activities Exception

The plaintiffs in Nelson also alleged the commercial activities exception as the basis for jurisdiction over their tort claims. This Court explained, however, that the plaintiffs did not allege breach of contract, but personal injuries, and that the torts and not the commercial activities that preceded the torts formed the basis of the suit. Nelson, 123 L.Ed.2d at 59. The Court held that tortious conduct "fails to qualify as 'commercial activity' within the meaning of the Act,..."

In this case, the plaintiffs allege pilot negligence as the basis of their claims. It is the activity that, if proven, would entitle plaintiffs to relief under their theory of the case. See id. 123 L.Ed.2d at 59. The plaintiffs' claims, therefore, are "based upon" pilot error, and not Exportadora's commercial activities that may have preceded the accident. In this regard, the Nelson

opinion cautioned that the conduct upon which a plaintiff's claims are based must present more than "a mere connection with, or relation to, commercial activity." Id. The Court found that while the Saudi government's recruitment and employment of the plaintiff constituted the activities that led to the tortious conduct, they were not in themselves the basis for the plaintiff's suit.

Similarly, although Exportadora hired Aviones in Mexico to transport the plaintiffs' decedent, those activities merely "led to" the eventual accident, and did not form the "basis" for the suit. Exportadora's commercial acts, in themselves, entitle the plaintiffs to nothing under their theory of the case. See id. 123 L.Ed.2d at 59.

The Third Circuit is the only other circuit court since Nelson to consider whether tort claims support jurisdiction under the first clause of the commercial activities exception. See, Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3rd Cir. 1993). In Federal Insurance, various plaintiffs attempted to hold two Dutch government-owned corporations liable for personal injuries resulting from a fire in a building in Philadelphia owned by subsidiaries of the corporations. The Dutch corporations had created the subsidiaries to invest in and manage the property. The plaintiffs argued that their claims were based upon these commercial acts.

The Federal Insurance court, consistent with Nelson, found that the plaintiffs' claims were based upon allegations of negligence, recklessness, nuisance, and strict liability. Id. at 1289. The court held that the claims were not "based upon" the defendants' commercial activity, since that was irrelevant to the plaintiffs' tort claims. Similarly, the plaintiffs' claims in this case are "based upon" allegations of pilot error for which Exportadora is alleged to be vicariously liable. The only

commercial act undertaken by Exportadora was in contracting for the flight -- which occurred in Mexico, and does not form the "basis" of the plaintiffs' suit.

B. The Aviones Flight Should Not Be Imputed to Exportadora as a Basis for Jurisdiction

Even if "commercial activity" can take the form of "tortious flying," as the Ninth Circuit held in Sugimoto, this act was carried on in the United States by Aviones, not Exportadora. Therefore, the plaintiffs' claims are not based on any commercial activity of Exportadora. The Ninth Circuit in Sugimoto, however, found that, "Exportadora was engaged in commercial activity within the United States when the air taxi [Aviones] flew in United States air space,..." Sugimoto, 19 F.3d at 1311.

Exportadora and Aviones are separate juridical entities. The Ninth Circuit acknowledged Aviones was an independent contractor, yet the court never explained why the commercial acts of a separate entity should be imputed to a foreign sovereign for jurisdictional purposes. It appears the court relied on principles of vicarious tort liability that it used to attribute Aviones' liability to Exportadora.[5] Whether jurisdiction over a foreign sovereign can rest on principles of "vicarious liability," however, is an issue that seems germane only to the noncommercial tort exception (28 U.S.C. § 1605(a)(5)) and not the commercial activities exception.[6]

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[5]The court separately analyzed, later in the opinion, Exportadora's tort liability for the acts of Aviones, the independent contractor.

[6]The noncommercial tort exception, however, was not factually developed in the district court, nor was it relied on by the Ninth Circuit in either Schoenberg or Sugimoto. It is doubtful that jurisdiction would exist under the noncommercial tort exception, because the language of § 1605(a)(5) is specifically limited to cases involving torts committed by the sovereign's officials and employees.

By contrast, no such theory of "vicarious commercial acts" has ever been developed, or can be said to have ever existed, within our system of jurisprudence; this is an issue arising solely within the context of the commercial activities exception of the FSIA. The Ninth Circuit in Sugimoto unwittingly developed this unprecedented expansion in our law, and erred in doing so. Indeed, the Ninth Circuit's earlier opinion in Schoenberg expressly avoided the issue of vicarious liability, finding that it was an issue which had no bearing on jurisdiction under the commercial activities exception. See Schoenberg, 930 F.2d at 782 n.3.

In attributing the commercial acts of Aviones to Exportadora, the Sugimoto court also failed to heed the separate juridical status of these entities in accordance with this Court's cautionary words in First National City Bank v. Banco Para El Com. (Bancec), 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983). Bancec urged a restrained approach in imputing liability, much less jurisdiction, to separate foreign juridical entities. Although Bancec involved the attribution of substantive liability, it has provided guidance to courts in determining the attribution of jurisdiction under the commercial activities exception. See, e.g., Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1287 (3rd Cir. 1993); Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1382 (5th Cir. 1992).

The circumstances in Federal Insurance are analogous to those in the present case in considering whether jurisdiction may be imputed to a foreign sovereign under the commercial activities exception. The Federal Insurance court identified the relevant commercial activity as "the formation of two wholly owned Dutch subsidiaries" -- activity not directly undertaken in the United States -- and held that the district court erred in

attributing the acts of the subsidiaries to the parent corporations as a basis for jurisdiction. Id. at 1286.

First Insurance therefore directs that the commercial acts of one entity inhere to that entity alone and may not be attributed to another, no matter how closely related, to establish jurisdiction under the commercial activities exception. Since Exportadora and Aviones are not related foreign instrumentalities, but are separate legal entities, jurisdiction based on the attribution of Aviones' commercial acts is more tenuous.

IV. THE COMMERCIAL ACTIVITY RELIED ON FOR JURISDICTION DID NOT HAVE SUBSTANTIAL CONTACT WITH THE U.S.

This Court in Nelson expressly left open the issue of what constitutes "substantial" activity under section 1603(e) of the FSIA. Nelson, 123 L.Ed.2d at 58. The FSIA itself provides little guidance in defining the term "substantial." The examples in the FSIA's legislative history contemplate only the execution of commercial transactions, indicating that Congress may not have envisaged the burgeoning efforts of plaintiffs to base personal injury claims on the slightest commercial activity conducted in the United States. Nevertheless, the plain meaning of the term "substantial" means "[o]f real worth and importance.... [s]omething worthwhile as distinguished from something ... merely nominal." Black's Law Dictionary (6th ed. 1990). Cf. Saudi Arabia v. Nelson, 123 L.Ed.2d at 58-59 ("Although the Act contains no definition of the phrase 'based upon,' and the relatively sparse legislative history offers no assistance, guidance is hardly necessary") citing Black's Law Dictionary (6th ed. 1990).

Whatever the significance of the actual aircrash, the commercial activity did not have "substantial contact" with the United States to justify the exercise of

jurisdiction pursuant to the commercial activities exception. The air taxi's commercial contact with the United States was not "substantial" within the ordinary meaning of that word, since it was only a brief intrusion into U.S. airspace. Otherwise, jurisdiction could be based on the most *de minimis* contacts, contrary to the meaning of the term "substantial," and contrary to the Constitutional mandate that personal jurisdiction comport with due process notions of "fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed.2d 95 (1945).

The exceptions for exercising jurisdiction under the FSIA track the Constitutional requirements for in personam jurisdiction.[7] It appears that the first clause of the FSIA tracks the requirements for exercising "specific jurisdiction,"[8] in which the plaintiff's claim must be "based upon," or "arise out of" a "substantial connection" with the forum state. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528, 542 (1985); McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957). The FSIA cannot require a lesser showing without violating Exportadora's rights to due process.

In McGee, the Court found that the defendant's contacts with the forum state were "substantial," where the defendant had deliberately solicited insurance from California residents, and because the contract was delivered in California and all payments were made from California. The defendant had "purposefully availed"

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[7] See, e.g., House Report at 13, stating that the immunity provisions of the FSIA require "some connection with the lawsuit and the United States," and "prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction."

[8] See Helicopteros Nacionales de Colombia, S.A. v. Hall, 444 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)(discussing distinction between general and specific jurisdiction).

itself of the benefits of California's law. This Court has explained that "purposeful availment"

> [E]nsures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts [cites], or of the "unilateral activity of another party or a third person. [Cite]. Thus where the defendant "deliberately" has engaged in significant activities within a State [cite], or has created "continuing obligations" between himself and residents of the forum [cite], he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King Corp. v. Rudzewicz, 471 U.S. at 475-76, 105 S.Ct. 2174, 85 L.Ed.2d at 542-43.

Under this analysis, jurisdiction over Exportadora is improper. Exportadora's activities were not "purposefully" and "deliberately" directed to California when it hired the air taxi that fortuitously flew into U.S. airspace, nor could Exportadora have foreseen that the air taxi would enter U.S. airspace. Moreover, due process requires that the contacts "proximately result from actions by the defendant himself," and not by the "unilateral actions of a third person." Burger King Corp. v. Rudzewicz, 471 U.S. at 475-76, 105 S.Ct. 2174, 85 L.Ed.2d at 542-43 (emphasis in original).

CONCLUSION

The Ninth Circuit's decision in Sugimoto threatens to expand jurisdiction over foreign sovereigns in United

States courts and to undermine the intent of Congress in enacting the FSIA to establish uniform law, by creating a new exception to immunity that would derive from state laws for attributing liability of third parties to foreign entities. As a separate issue of equal significance, the unique proceedings in this case eliminated Exportadora's ability to establish that its activity was "public" and not "commercial" in fulfilling Mexico's governmental obligations to Japan. Mexico respectfully urges the Court to grant certiorari for this case allowing comprehensive briefing on the issues of far reaching international significance.

Respectfully submitted,

Dated: November 3, 1994 ROBBINS & KEEHN

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No. A 94-651 (6)

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V., *Petitioner*,

v.

HIROKO SUGIMOTO, et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 LISTING

Petitioner EXPORTADORA DE SAL, S.A. DE C.V., is a foreign corporation, owned in majority part by the Government of the United States of Mexico, and has no parent corporation and no subsidies or affiliates which issue shares to the public.

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EXPORTADORA DE SAL, S.A. DE C.V., hereby submits its reply to respondents' brief in opposition to EXPORTADORA's petition for a writ of certiorari.

I

EXPORTADORA IS NOT HERE CONTESTING THE DISTRICT COURT'S FINDINGS OF FACT

Because respondents have accused EXPORTADORA of misstating the facts, this reply will begin with a brief discussion of some of the important findings of fact related to the jurisdiction determination. However, EXPORTADORA is not seeking this Court's review of factual findings. EXPORTADORA seeks review of an issue of law -- whether, given the facts found by the courts below, jurisdiction could properly be exercised over EXPORTADORA.

Respondents' claims arise out of the crash of an airplane on a flight from Guerrero Negro, Mexico, to Tijuana, Mexico. Contrary to respondents' statement in their opposition, the decedents were in Guerrero Negro as a result of decisions made in Mexico and Japan. The District Court found that the requests for EXPORTADORA's assistance in arranging the decedents' travel to Guerrero Negro came by telexes from the Tokyo office of the Mitsubishi Corporation (App. 17-21, F. 11-13, 15, 17-18)[1]. These telexes were sent to EXPORTADORA's Mexico City and Guerrero Negro offices, from which EXPORTADORA forwarded its confirmation of the travel arrangements (Id.). Certainly, EXPORTADORA's San Diego office was involved in the transportation of the decedents -- after leaving Japan, they had a brief stop in San Diego, where they were met by EXPORTADORA employees and taken to the Tijuana airport to catch a flight to Guerrero Negro. However, the District Court did not, and could not, find that any of the actual decisions involving the decedents' travel arrangements were made in San Diego --

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[1]References to the previously-filed Appendix will be cited herein as "App.," followed by the appropriate page and, when referring to the District Court's "Findings and Conclusions," a finding ("F") number.

those decisions were all made in Mexico and Japan.[2]

There was no evidence that EXPORTADORA was paid for any of the decedents' travel arrangements; the District Court found that the transportation was all at EXPORTADORA's expense (App. 19, 21, 24, F. 14, 18, 32). The Court of Appeals in its first decision did find that EXPORTADORA was motivated by a more indirect form of potential compensation – the facilitation of "future commercial dealings" and "maintaining good will." However, this examination of EXPORTADORA's alleged "purpose" for arranging the transportation violates 28 U.S.C. § 1603(d), which specifically provides that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

It is undisputed that decedents' journey to Guerrero Negro was without incident. Respondents' action is based on what occurred on the return flight – the crash of the Aviones plane on approach to the Tijuana Airport. It is undisputed that the decision to use Aviones for the flight was made in Mexico. The District Court found that EXPORTADORA's Guerrero Negro office selected Aviones when it learned that the company plane would not be available (App. 23-25, F. 27, 31, 33).

The District Court found that "Aviones had provided Exportadora with safe and reliable air service on charter flights between Guerrero Negro and Tijuana," and that Aviones was "licensed, qualified and fully competent..." (App. 24-25, F. 32, 34). Further, and contrary to respondents' misrepresentation, the

---

[2]The Court of Appeals in its first opinion held that it was "immaterial" where the actual decisions regarding the travel arrangements were made – "the San Diego office was involved in arranging the trip, no matter where the decisions were made." (App. 97, n.2). However, the Court of Appeals in its first decision completely overlooked the requirement that, for jurisdiction to exist under the first clause of 28 U.S.C. § 1605(a)(2), the action must be "based upon" the "commercial activities" of the defendant in the United States. And, respondents' action was not "based upon" the activities of the San Diego office.

pilot provided by Aviones to perform the flight "was a qualified pilot for the flight," and was properly licensed to perform instrument landings (App. 17-18, F. 43, 46).

The flight was scheduled to fly directly from Guerrero Negro to Tijuana, Mexico (App. 24, 30, F. 31, 47) -- there was no evidence that the flight was ever scheduled to fly into United States airspace. The Aviones pilot may have been aware that the Tijuana airport employs a poor weather approach which swings over United States territory, but there was no evidence, and no finding, that anyone dealing with the decedents' travel arrangements at EXPORTADORA was aware of this approach. Further, while some of the weather reports available in the United States may have forecast poor weather in Tijuana, the evidence at trial established that the reports relied on by the pilot -- the weather reports which were available in Mexico -- did not predict poor visibility conditions.

Consequently: (1) there was no evidence that EXPORTADORA intended the flight to enter United States airspace; (2) there was no evidence that EXPORTADORA was aware that a flight to Tijuana could involve entry into United States airspace if bad weather was encountered; and (3) there was no evidence that anyone at EXPORTADORA was aware that this particular flight would encounter bad weather in Tijuana. Further, the District Court found that EXPORTADORA told the pilot that, "if conditions were not right in Tijuana airport, the pilot could proceed to Mexicali." (App. 30, F. 47).

The District Court specifically held that Aviones was an independent contractor (App. 31, 48, F. 49, 98, 99). And, EXPORTADORA had no control over the flight once it left Guerrero Negro. The District Court found that:

> [T]he conduct of the flight was under the control of the Aviones pilot...The decision to undertake the flight, how the flight would be conducted and whether under the restricted conditions a landing at the Tijuana airport should be attempted rested with the pilot, not with Exportadora.

(App. 60, F. 119).

Respondents' offensive statement that "[p]eople were killed by Exportadora's negligent commercial activity..." is completely erroneous. There has never been any finding that EXPORTADORA was negligent. The District Court found that the accident was the result of the Aviones pilot's negligence (App. 45, 60 F. 93, 119). While EXPORTADORA was held, for "policy" reasons, to have vicarious liability for decedents' death, it has never been held to have done anything wrong.

II

RESPONDENTS' ACTION IS "BASED UPON" EVENTS WHICH OCCURRED IN MEXICO

The only basis for jurisdiction found by the courts below is the first clause of 28 U.S.C. § 1605(a)(2), which creates an exception to sovereign immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state." The Court of Appeals' first decision in this case, on an interlocutory appeal from the denial of a motion to dismiss, held that: "The FSIA requires two components for this exception to apply: (1) that the foreign entity be engaged in commercial activity, and (2) that the commercial activity have substantial contact with the United States." (App. 95). The Court of Appeals held that these "two components" were satisfied in this case, because: (1) EXPORTADORA was engaged in "commercial activity" when it arranged for the decedents' transportation; and (2) this "commercial activity" had a "substantial contact" with the United States because EXPORTADORA's San Diego office was involved in the transportation of the decedents.

Saudi Arabia v. Nelson, 507 U.S. ____, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), made it clear that the Court of Appeals had completely overlooked an essential third requirement for jurisdiction under the first clause of § 1605(a)(2) – that the action must be "based upon" the commercial activities performed in the United States. In its second decision, the Court of Appeals acknowledged the "based upon" requirement. However, the Court completely ignored its prior decision's reliance on the alleged

"commercial activity" of EXPORTADORA's San Diego office. Instead, the Court held that jurisdiction existed because the Aviones flight was itself "commercial activity," and respondents' action was "based upon" the Aviones pilot's alleged negligent acts while in United States airspace.

However, the alleged negligence of the Aviones pilot was not commercial activity of EXPORTADORA which had a "substantial contact" with the United States. The flight was scheduled to fly directly to Tijuana, and was only over United States territory because poor weather in Tijuana led to the pilot's use of an approach which briefly -- for only a few minutes out of the two hour flight -- swung over the United States. Further, at the time the decision to enter United States airspace was made, and at the time the negligent acts were allegedly committed, the flight was in the complete control of a qualified independent contractor. Consequently, while the second Court of Appeals decision does consider the "based upon" requirement, it neglects the equally important requirement that respondents' action be based upon commercial activity of EXPORTADORA which has a "substantial contact" with the United States.

In their opposition, respondents argue that: (1) while neither Court of Appeals decision so held, the evidence would support a finding that respondents' action was "based upon" the commercial activity of EXPORTADORA's San Diego office; (2) a non-delegable duty to decedents arose out of the commercial activity of EXPORTADORA's San Diego office; and (3) a "substantial contact" with the United States exists because the plane crashed there. These after-the-fact justifications fail to support the exercise of jurisdiction over EXPORTADORA.

A. RESPONDENTS' ACTION WAS NOT "BASED UPON" THE ACTIVITIES OF EXPORTADORA'S SAN DIEGO OFFICE.

The Court of Appeals in its first decision did not hold that respondents' claims were based upon the commercial activities of EXPORTADORA's San Diego office. Nothing happened during the San Diego office's "commercial activities" which would allow

the filing of any claim against EXPORTADORA. The decedents were met in San Diego as planned, and were transported from the San Diego office to the Tijuana airport, and from the Tijuana airport to Guerrero Negro, without incident.

Indeed, the Court of Appeals itself clearly did not believe that respondents' action was "based upon" the events in San Diego. In its second decision, the Court's jurisdiction analysis nowhere mentions the activities of the San Diego office in finding jurisdiction. Rather, the Court found jurisdiction to exist based on EXPORTADORA's vicarious liability for the Aviones pilot's negligence while flying in United States airspace; this vicarious liability was held to arise out of events which occurred in Mexico.

B. ANY "DUTY" TO DECEDENTS AROSE IN MEXICO.

Respondents next argue that the crash of the airplane breached a non-delegable duty which arose out of the "commercial activities" of EXPORTADORA's San Diego office. This argument is also refuted by the Court of Appeals' second decision -- the jurisdiction analysis in that opinion makes no mention of the supposed "commercial activity" of the San Diego office. It simply finds that the Aviones pilot was flying in United States airspace when he committed negligent acts, and therefore that there was "commercial activity" in the United States. To the extent that the Court of Appeals found that EXPORTADORA had a duty to decedents, that duty arose out of events which occurred in Mexico.

Specifically, the Court held that EXPORTADORA was liable for the acts of independent contractor Aviones (1) because EXPORTADORA "controlled the transportation offered to business visitors to its plant and company town" (Guerrero Negro), and (2) because "policy" factors indicated that EXPORTADORA should be held liable for the independent contractor's negligence: EXPORTADORA selected the contractor, could insist on a contractor which was financially responsible, could demand indemnity from the contractor, and could insure for the risk as a part of its business. These factors obviously have nothing to do with the San Diego office's assistance with the decedents'

transportation; they have everything to do with EXPORTADORA's acts and operations in Mexico. Consequently, the "duty" to decedents' upon which EXPORTADORA's liability was based arose in Mexico.

C. THE AVIONES PILOT'S NEGLIGENCE WAS NOT "COMMERCIAL ACTIVITY" OF EXPORTADORA HAVING A "SUBSTANTIAL CONTACT" WITH THE UNITED STATES.

The Court of Appeal's second opinion finds that respondents' action is "based upon" the negligence of the Aviones pilot in United States airspace. However, this finding does not suffice – as the Court held in Saudi Arabia v. Nelson, supra, 113 S.Ct. at 1477, the "action must be 'based upon' some 'commercial activity' by [defendant] that had 'substantial contact' with the United States..." Here, the pilot's negligent acts were not "commercial activity" of EXPORTADORA which had a "substantial contact" with the United States. This is because the "commercial activity" was not performed by EXPORTADORA, but by an independent contractor, and because that independent contractor's entrance into United States airspace was neither directed nor expected by EXPORTADORA.[3]

Respondents cite cases dealing with jurisdiction based upon an agent's commercial activities. However, those cases all involved acknowledged agents of the foreign sovereign, who had been specifically engaged for the purpose of conducting commercial activities in the United States. None of those cases involved a situation similar to that here present, where (1) Aviones was not an agent of EXPORTADORA, but rather was held to be acting as an independent contractor, and (2) the contracted for

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[3]Respondents cite Olsen by Sheldon v. Govt. of Mexico, 729 F.2d 641 (9th Cir. 1984), for the proposition that a flight's entrance into United States airspace on approach to the Tijuana airport is "neither accidental nor fortuitous." However, the Court in that case was not dealing with subject-matter jurisdiction, but with personal jurisdiction, where the plane was owned and operated by the Mexican Government.

services did not provide for, contemplate, or require, any contact with the United States -- the flight was scheduled to fly directly from Guerrero Negro to Tijuana.

EXPORTADORA is not arguing that liability can never be attributed to a foreign sovereign based on the acts of an independent contractor, but that jurisdiction cannot be based on such acts where the foreign sovereign did not intend or expect the independent contractor to have any contact with the United States. In such circumstances, the assertion of jurisdiction over EXPORTADORA based solely on the acts of independent contractor Aviones is certainly improper.

III

NO ALTERNATIVE GROUNDS FOR JURISDICTION EXIST

Respondents have urged alternative grounds for jurisdiction, but the courts below have never considered, or ruled on, any of those grounds -- jurisdiction has only been found under the first clause of § 1605(a)(2). Despite respondent's claim that "Exportadora's statement that no other exceptions were considered is false," respondents cite no portion of any of the lower courts' decisions which rule on any alternative basis of jurisdiction -- no such citations exist. And, insofar as the record has not been developed regarding the potential applicability of these exceptions, they cannot properly be advanced in this Court.

Respondents' representation that EXPORTADORA "waived sovereign immunity in opening statement," and that EXPORTADORA was not denied the opportunity of contesting jurisdiction at trial, is false. Counsel never stated during opening argument that EXPORTADORA stipulated to subject-matter jurisdiction, or that it waived sovereign immunity. However, immediately after opening statements, the District Court specifically ruled that it would not reconsider the Court of Appeals' prior determination that jurisdiction existed in the case, and that it would not reconsider any of the Court of Appeals' findings of fact in support of that determination. "Those findings are critical to the conclusion reached by the Court of Appeals, and

I will not review [them]." Reporter's Transcript, I-48 (lines 10-12); see also App. 16, F. 7. The District Court reaffirmed that ruling on a number of occasions.

In light of the District Court's ruling, EXPORTADORA's decision not to proffer evidence at trial regarding the absence of jurisdiction cannot be seen as a waiver.[4] To the contrary, EXPORTADORA contested jurisdiction at every available opportunity – indeed, its first responsive pleading was a motion to dismiss based on the absence of jurisdiction under the FSIA, and it appealed the denial of that motion to the Ninth Circuit.

It should also be noted that the Courts have uniformly held that jurisdiction under the FSIA is a "preliminary determination," to be made at "the threshold of every action." Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 494, 103 S.Ct. 1962 (1983); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 706 (9th Cir. 1992). Obviously, a claim of waiver of immunity based solely on events which occurred after trial began cannot be made "at the threshold" of the action. Petitioner has been unable to find any cases holding that a waiver of sovereign immunity can be based on conduct at trial; indeed, a number of courts have specifically observed that the "federal courts have been reluctant to find a waiver from the nature of a foreign state's participation in litigation." Rodriguez v. Transnave, Inc., 8 F.3d 284, 289 (5th Cir. 1993); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985).

This case involves foreign plaintiffs suing a foreign sovereign, and subject-matter jurisdiction is therefore based solely on the alleged absence of immunity under the FSIA. See

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[4]Waiver of immunity was not raised in the pre-trial order; if it had been, petitioners' counsel would have asserted the jurisdiction arguments at trial despite the District Court's ruling. Appellate courts will not review theories not raised in the pre-trial order if their inclusion in the order might have caused the opposing party to try its case differently. See Seymour v. Coughlin Co., 609 F.2d 346, 349 (9th Cir. 1979); United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978).

Verlinden B.V. v. Central Bank of Nigeria, supra. That being the case, to allow statements at trial to be the basis for finding a waiver of immunity would be tantamount to allowing the parties to create jurisdiction in the Federal courts by stipulation.

EXPORTADORA has continuously asserted its sovereign immunity defense, beginning with its first appearance in this action, and none of the decisions in this case have found any "waiver" of immunity; indeed, none of the decisions considered any of the alternative bases for jurisdiction now proffered by respondents. EXPORTADORA submits that the facts of this case establish that jurisdiction cannot be found under any of those alternative bases. It is also clear, however, that those alternative bases are not ripe for consideration at this time.

IV

CONCLUSION

The Court of Appeals' opinion has expanded the jurisdictional reach of the United States courts not only beyond the borders of this country, but beyond the limits set forth by Congress in the Foreign Sovereign Immunities Act. In so doing, the Court of Appeals has allowed the United States courts to interfere with legal matters which arose in, and which should be resolved in, Mexico. EXPORTADORA submits that this case presents important jurisdictional issues which can only be resolved by this Court, and EXPORTADORA therefore requests that the Court grant the instant petition for a writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: November 11, 1994

GRECO & TRAFICANTE

By: _____
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Supreme Court, U.S.
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No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN REPLY TO BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES AT THE PETITION STAGE

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I. THE AGREEMENT IS NOT APPLICABLE.

A. Mexico's Translation is Incomplete and Misleading: The Agreement did not Go Into Effect Until After the Accident.

The United Mexican States ("Mexico") has not translated the preamble and Article XII of the document in its appendix ("federal registry" - "Diario Official" of April 25, 1988 - the "agreement"). (AM 3-8) [1] Untranslated provisions state that the agreement went into effect on December 17, 1987, *three months after the accident of September 30, 1987*, on the day the government of Japan received written notification from the government of Mexico that the United Mexican States had completed the constitutional procedures to put the agreement into practice. (A 318) The preamble further provides that the agreement was approved by the Mexican Senate on October 22, 1987, 22 days after the accident. (A 316) The notification required to put the agreement in effect under Article XII was given in Tokyo on December 17, 1987 and on January 28, 1988. (A 316 ¶ 6)

The agreement that Mexico has presented to the Court as *amicus* went into effect after the accident. A certified translation of the preamble and Article XII is set forth in the accompanying appendix. (A 315-318)

The federal registry agreement is not applicable.

B. Mexico's Brief Admits that Exportadora did not Know of the Agreement until After the Accident.

Mexico's *amicus* brief admits that petitioner Exportadora De Sal, S.A. De C.V. ("Exportadora") did not

[1] Mexico's appendix as amicus is cited "AM" followed by the page number.

know of the agreement until "after the interlocutory appeal but before trial." (Amicus Brief at 4) In other words, Exportadora did not even know of the agreement, and thus was not acting under the agreement, at the time of the accident.

C. Mexico's Request for Judicial Notice is Unreasonable and Contrary to California Law as the Choice of Law.

Mexico's amicus curiae brief is submitted by John Stephens as counsel, who represented Exportadora in its prior interlocutory appeal. Schoenberg v. Exportadora De Sal, S.A. De C.V., 930 F.2d 777 (9th Cir. 1991).

During oral argument of that appeal, on March 6, 1991, Mr. Stephens stated that he was in possession of "an official diary from the Mexican government . . . [and] it does refer to what is intended between Mexico and Japan . . . ." (A 291)[2] - apparently the same document. (AM 3-8)

Mr. Stephen's unsworn statements as to what two foreign governments intended are hearsay, lack foundation, are not based upon personal knowledge, and are objected to as such. Respondents object and move to strike Mr. Stephens' assertions, contained in Mexico's *amicus* brief, and to strike the inapplicable federal registry. The agreement is not in the record of the courts' below.

Mexico's request for judicial notice at the petition stage in the Supreme Court fails to give reasonable written notice as required. Rule 44.1, Fed.R.Civ.P. Where no reasonable written notice was given in the courts below, the request for judicial notice should be denied. Ruff v. St.Paul Mercury Ins. Co., 393 F.2d 500, 502 (2nd Cir. 1968).

Mexico, in requesting judicial notice of a matter of

[2] Mr. Stephens statement of March 6, 1991 to the Ninth Circuit is set forth verbatim in the accompanying appendix to this supplemental brief.

Mexican law, is arguing in effect for the application of Mexican law to the case. The choice of law in this case is California law, a decision that Exportadora has not challenged in the courts below, nor in this Court. Schoenberg at 783-784. (A 101-103) Exportadora's counsel agreed at trial that California law applies. (A 222)

D. The Court Should not Take Judicial Notice of an Extra-Record Document not Produced in Response to Orders to Compel, Which no Witness Connected to the Facts of the Case.

No witness testified in this case that any such agreement between Japan and Mexico existed. The sworn testimony was the exact opposite - Exportadora's President, Juan Bremer, testified that there was no agreement with Japan until after the accident. (A 234-235) At the time of the accident, by contrast, "it was the Japanese partners [Mitsubishi], yes, that invited Tottori [University scientists], and Exportadora that accepted them in those days." (A 234) The government of Mexico *asked* Exportadora to assist the agricultural project (A 224) *the request was not an order.* (A 234)

Plaintiffs requested documents from petitioner Exportadora on June 27, 1991 and December 6, 1991 (A 296; A 306), *"pertaining to any request and/or instruction by the government of Mexico to Exportadora to assist the agricultural project . . . request and/or instruction to Exportadora to provide transportation or accommodations to people traveling to the agricultural project"* (A 297 ¶ 4, 6, 7); an earlier request was made in 1990.

Orders to compel production of documents were issued on August 24, 1990, November 21, 1991 (A 300-303) and January 15, 1992. (A 310-313)

The federal registry document was never produced in discovery and is not in the record. It surfaced for the

first time in Mexico's *amicus* brief about November 10, 1994, more than three years after the document was in Mr. Stephens' possession. The inference is that the document is not responsive to the orders to compel, that it does not pertain to the transportation in the case.

The Court should not take judicial notice of foreign law in the complete absence of expert testimony to show its relevance. *The absence of expert testimony raises an inference that the foreign law is contrary to the construction advanced by the proponent.* Dulles v. Katamoto, 256 F.2d 545, 547 (9th Cir. 1958).

Foreign law is usually proved by expert testimony accompanied by extracts from foreign legal materials. 9 Wright & Miller, Federal Practice and Procedure, Civil § 2444, p. 406. No expert witness has connected the federal registry as applicable to this case. To the contrary, *the sworn testimony of Exportadora's witnesses in the trial record is that the Japanese scientists were carried at the request of Mitsubishi as a courtesy to a stockholder.* (A 233-235, 243-244) This is consistent with the district court's findings in 1989 (A 127), as affirmed in Schoenberg at 781. (A 97) And consistent with the findings in 1993 (A 61 F 120; A 66 F 128), as affirmed. (A 7) Sugimoto v. Exportadora De Sal, S.A. De C.V., 19 F.3d 1309, 1310-1311 (9th Cir. 1994).

Mitsubishi was not carrying out any technical cooperation agreement in requesting transportation for these university scientists. If the issue is one of fact, the Court should not take judicial notice of a document that is not a new development that could not have been included in the record of the courts below. Zell v. Jacoby-Bender, Inc., 542 F.2d 34, 38 (7th Cir. 1976). [3]

The Court should not take judicial notice of hearsay, such as counsel's extra-record assertions that attempt to connect the April 1988 federal registry to a 1987 accident.

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[3] Mexico's translation was certified on July 11, 1991. (AM 8)

United States v. Glass, 744 F.2d 460, 461 (5th Cir. 1984); Kemlon Products & Development Co. v. United States, 646 F.2d 223, 224 (5th Cir. 1981).

E. Mexican Law is Contrary to Mexico's Contentions.

Under Mexican law an international agreement usually goes into legal effect one working day after it is published in the federal registry, unless the agreement specifies another effective date. Article 284, Federal Code of Civil Procedure, United Mexican States. Respondents request that the Court take judicial notice that Mexican law is contrary to Mexico's *amicus* contentions.

II. MEXICO CONFUSES PURPOSE WITH NATURE.

Mexico's contends that the transportation of the scientists was not commercial because private persons do not transport foreign scientists for the purpose of fulfilling an international agreement. (Amicus Brief at 6) Mexico misstates the facts. There is no evidence of that purpose.

Even if, for the sake of argument, Mexico had an effective agreement with Japan, it would make no difference. Mexico's *amicus* argument confuses purpose with nature. Exportadora's transportation link between corporate offices was part of Exportadora's commercial activity. (A 126-127) The focus is on the specific acts that form the basis of the suit. Joseph v. Office of Consulate General of Nigeria, 830 F.2d 1018, 1023 (9th Cir. 1987).

Mexico's purpose in requesting that Exportadora transport the scientists is not relevant to the nature of Exportadora's transportation activity as commercial. It would make no difference what Mexico's purpose was if Mexico arranged for tickets to be issued through an Aero Mexico office in San Diego to scientists for a commercial

Aero Mexico flight. The Court would still have jurisdiction over Aero Mexico under the commercial activities exception when the flight crashed in San Diego. And it makes no difference where Mexico requested that Exportadora transport scientists without tickets, with the transportation arranged through Exportadora's San Diego office, on Exportadora's commercial transportation link. The flight was still commercial. The Court has jurisdiction over Exportadora under the commercial activities exception when the flight crashed in San Diego.

III. MEXICO MISSTATES THE FACTS.

Mexico misstates the facts in asserting that the scientists were transported at the "instruction" of Mexico (Amicus Brief at 3) or that Mexico "directed" Exportadora to transport the passengers. (Amicus Brief at 6) To the contrary, as *Mr. Bremer testified, "they [the government of Mexico] didn't order us to do things" (A 234), "there could have been a request . . . there were no orders given . . . and Mitsubishi was interested in these professors' studies of the desert . . . ." (A 235)* The findings are correct. (A 17-19) (transportation was requested by Mitsubishi)

Mexico was not "deprived of the opportunity to introduce the agreement at trial" as the *amicus* brief misstates. (Amicus Brief at 3) Exportadora waived sovereign immunity at trial (A 219-221) and chose not to offer evidence on jurisdiction. (A 221)

IV. THE CLAIMS ARE BASED ON EXPORTADORA'S COMMERCIAL ACTIVITY IN THE UNITED STATES.

Mexico misstates the holding in Schoenberg in asserting that arranging transportation through the San Diego office was the only basis for jurisdiction. (Amicus

Brief at 12) To the contrary, Exportadora's transportation of the decedents in the United States was held to be an additional basis for subject matter jurisdiction. Schoenberg at 780-781. (A 96-98) The second panel also found that an element of plaintiffs' claim consisted of Exportadora's transportation of decedents inside the United States. Sugimoto at 1311. (A 7)

The elements of plaintiffs' wrongful death claims, based upon breach of the implied contract for round trip transportation from San Diego, non-delegable duty, and ostensible agency all contain elements consisting of Exportadora's commercial activities in the United States. The implied contract was arranged through the San Diego office and made in California when Exportadora accepted the passengers for carriage in San Diego.

The passengers' reliance on Exportadora as the carrier, and some of Exportadora's manifestations for ostensible agency that Exportadora was the carrier, began through the San Diego office when Exportadora accepted Mitsubishi's request for transportation on the company airplane, and continued when the passengers were met by Exportadora's representatives in San Diego and transported by Exportadora in San Diego at the outset. [4]

The non-delegable duty was assumed in San Diego. The flight was purposefully directed towards the United

---

[4] Certainly Exportadora's implied invitation to the decedents to travel to the forum state, California, in order to be transported to Guerrero Negro, was purposeful availment of conducting activities in the forum state, invoking the benefits and protections of California law. So too were Exportadora's routine operation of a transportation link from San Diego, its operation of a San Diego office, and its operation of, or instructions to, airplanes flying in California. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 85 L.Ed.2d 528, 542, 105 S.Ct. 2174 (1985). As the district court found in 1989: *"In having its corporations transport passengers in California airspace, Mexico should fully expect to be held accountable under California law."* (A 143)

States by Exportadora. As to all theories of the case, the duty of care was breached in the United States. The decedents were killed in the United States as a proximate result of breach of the duty here.

The commercial activities of Exportadora are a sufficient course of conduct for subject matter jurisdiction. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-777, 79 L.Ed.2d 790, 797-799, 104 S.Ct. 1473 (1984).

V. MEXICO ADMITS THE NATURE OF THE FLIGHT WAS COMMERCIAL.

Mexico admits that Exportadora's transportation of Omachi was commercial. (Amicus Brief at 11) Nothing distinguishes the transportation of Omachi from the transportation of the other passengers, other than Mexico's assertions as to its extra-record purpose. In admitting that Omachi's transportation was commercial, Mexico admits in effect that the other passengers on the same flight were carried on a commercial flight.

VI. THE COMMERCIAL ACTIVITIES EXCEPTION APPLIES TO NEGLIGENCE IN A COMMERCIAL ACTIVITY.

Mexico contends that Saudi Arabia v. Nelson, 507 U.S. - - , 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) held that tort claims may not be based upon commercial activity. Saudi Arabia did not so hold. In Saudi Arabia the activity was abuse of police power, a sovereign activity.

If the nature of the activity is commercial, and if in the course of that activity personal injuries occur, the negligence that caused those injuries was commercial activity. To hold otherwise would be to hold that negligence is not an act that a private person can perform. Negligence is not a sovereign activity, as Mexico's contentions imply.

The plain reading of the commercial activities exception of the FSIA is that the exception applies to any case based upon commercial activity. The exception as enacted does not exclude personal injuries or wrongful death caused by commercial activity.

Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1289 (3rd Cir. 1993) did not hold otherwise. Federal Insurance merely held that the commercial activity of a holding company in forming and financing subsidiaries was not an element of any of the claims alleged. In the present case Exportadora acted directly, not through a subsidiary, in undertaking the carrier and passenger relationship with decedents in the United States, in entering into an implied contract with decedents to transport them non-negligently from and to the United States, and in undertaking a non-delegable duty in the United States.

VII. THE FLIGHT WAS EXPORTADORA'S COMMERCIAL ACTIVITY.

Mexico contends that there is no theory of vicarious commercial acts in jurisprudence. Mexico is mistaken. The theory of vicarious commercial acts is called agency. The charter from Aviones De Sonora, S.A. ("Aviones") was a substitute for the Exportadora company airplane, acting on behalf of Exportadora. (A 31 F 49; A 52 F 104)

Under a nondelegable tort duty the principal is liable for the negligence of his agent, "whether his agent was an employee or an independent contractor." Maloney v. Rath, 69 Cal.2d 442, 446 (1968). Contractual duty to perform a service is non-delegable. Harold A. Newman Co. v. Nero, 31 Cal.App.3d 490, 496 (1973). Aviones was Exportadora's agent under non-delegable duties.

Commercial acts on behalf of the principal by an agent in the United States under the FSIA are attributable

to the principal for jurisdiction. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2nd Cir. 1981); Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 n. 16 (D.C.Cir. 1982). Jurisdiction over the principal under federal law may be based upon the acts of an independent contractor representative who acts as an agent for the corporation. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 117, 119-121 (2nd Cir. 1967). California law is the same. Cosper v. Smith & Wesson Arms Co., 53 Cal.2d 77, 82-84, 346 P.2d 409 (1959); Regie Nationale Des Usines Renault v. Superior Court, 208 Cal.App.2d 702, 703-704, 25 Cal.Rptr. 530 (1962).

A tort committed by an agent in the United States is sufficient for subject matter jurisdiction over the principal under the FSIA. Gilson at 1026 n. 16; H.R.Rep.No. 1487, 94th Cong.2d Sess. 19 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News 6604, 6617 ("a representation in the United States by an agent of a foreign state"); and under California law. Indiana Ins. Co. v. Pettigrew, 115 Cal.App.3d 862, 867, 171 Cal.Rptr. 770 (1981); Magnecomp Corp. v. Athene Co., 209 Cal.App.3d 526, 531, 257 Cal.Rptr. 278 (1989).

VIII. CONCLUSION.

The petition for certiorari should be denied.

Dated: November 17, 1994
Belmont, California

Respectfully submitted,

Robin E. Foor
Counsel of Record
Attorney for Respondents

Supreme Court, U.S.
FILED
NOV 17 1994
OFFICE OF THE CLERK

No. A 94-651

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V.,

Petitioner,

vs.

HIROKO SUGIMOTO, et al.,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX TO RESPONDENTS' SUPPLEMENTAL BRIEF IN REPLY TO BRIEF OF AMICUS CURIAE UNITED MEXICAN STATES AT THE PETITION STAGE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOREEN S. SCHOENBERG, et al.,	) CA No. 89-55973) CA No. 90-55073) Consolidated
Plaintiffs-Appellees	) DC Consolidated Cases) Civil 88-1530 R (IEG)
vs.	) 88-1531 R (IEG)) 88-1532 R (IEG)
EXPORTADORA DE SAL, S.A. DE C.V.,	) 88-1919 R (IEG)) 88-1920 R (IEG)
Defendant-Appellant.	)

Honorable William C. Canby, Circuit Judge
Honorable Pamela A. Rymer, Circuit Judge
Honorable David F. Levy, District Judge

Excerpt of Recorder's Transcript of Proceedings

Pasadena, California

Wednesday, March 6, 1991

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(RT 7:23 - 8:12)

* * * *

THE COURT (JUDGE RYMER): I think the District Judge's finding was that they were requested to do it, and they did it.

MR. STEPHENS: Well, I think he also - -

THE COURT (JUDGE RYMER): There is a slight difference.

MR. STEPHENS: There's a request - - I think there's a distinction simply between instruction and request, but my reading is that - - and I would have to go back through his opinion again, that he used the word instructed.

But there's one other point that I think should be made, and it's unfortunate that it comes up at the time that it does. *I have recently come into possession of an official diary from the Mexican government. It's I think the equivalent of a federal register or Congressional digest, but in any event it does refer to what is intended between Mexico and Japan, and I would be happy to get this to the Court with an official translation, but I couldn't do it under the circumstances existing at the time that I received it because the time was inappropriate.*

* * * *

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al.,	Consolidated Civil No. 88-1530 R(IEG) 88-1531 R(IEG) 88-1532 R(IEG) 88-1919 R(IEG) 88-1920 R(IEG)
Plaintiffs,	
vs.	
EXPORTADORA DE SAL, S.A. DE C.V., et al.,	**THIRD REQUEST FOR PRODUCTION OF DOCUMENTS FROM EXPORTADORA DE SAL, S.A. DE C.V.**
Defendants.	

Propounding Parties: Plaintiffs DOREEN SCHOENBERG, et al.
Responding Party: Defendant EXPORTADORA DE SAL, S.A. DE C.V., et al. ("Exportadora")
Set: Three

TO DEFENDANT EXPORTADORA DE SAL, S.A. DE C.V. AND ITS ATTORNEYS OF RECORD:

You are hereby requested, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to produce for inspection and copying at the offices of Exportadora, Avenida Baja California S/N, Guerrero Negro, B.C.S., Mexico 23940, on a date to be set by the courts of Mexico pursuant to Letters of Request under the Hague Convention, or within a reasonable time after the service of this request for documents under Rule 34, at 9:30 a.m., the documents described in this request. If you fail to produce these documents in Guerrero Negro, Mexico by August 16, 1991, you are requested to produce these documents at the offices of Alexander & Sauner, 610 West Ash Street, Suite 1006, San Diego, CA 92101 on August 19, 1991 at 9:30 a.m.

You are further required to serve upon plaintiffs, pursuant to Rule 34 of the Federal Rules of Civil Procedure, not later than 30 days after the service of this request, a written response as required by Rule 34(b). The response must contain, for each of the categories listed in this request, a statement that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the specific reasons for each objection shall be stated.

If any document described in this request was, but no longer is in your possession, or subject to your custody or control, or in existence, state whether: 1) it is missing or

lost; 2) it has been destroyed; 3) it has been transferred voluntarily or involuntarily to others; or 4) it has been disposed of otherwise. In each instance, explain the circumstances surrounding such disposition and identify the person(s) authorizing the same, and the date(s) of such authorization, loss, destruction, transfer and/or disposition. Identify each document by listing its author, his or her address, type of document (e.g., letter, memorandum, telegraph, photograph, tape recording, video tape, etc.), date, subject, present location(s), custodian(s), and state whether the document(s) or copies are still in existence.

If you object to the production of any documents because of the attorney-client privilege, the work-product doctrine, or any other privilege applicable to a document, identify each document for which the privilege is claimed and give the following information: (a) the name of the writer or initiator of each copy of the document; (b) the name of the recipient, addressee, or party to whom each copy of the document was sent, if any; (c) the date of each copy of the document, if any, or if no date appears on the document, an estimate thereof, indicated as an estimate; (d) a description of the document; and, (e) a statement of the basis of the claim of privilege.

DEFINITIONS AND INSTRUCTIONS

a. The word "document" is used in its broadest sense and means the original and any and all copies of any and all written, printed, typed, tape recorded, videotaped, electronically recorded, magnetically recorded or stored, or otherwise recorded, memorialized, or stored, however produced or reproduced, or every kind or description, in whatever form (including final and all draft versions) in your actual or constructive possession, custody or control, including, but not limited to, all writings, contracts,

policy statements, manuals, telephone messages, checks, correspondence, letters, telegrams, telexes, mailgrams, electronic messages, E-mail messages, computer network messages, minutes of any meetings, agendas, memorandums, interoffice communications, reports, studies, schedules, airplane flight schedules, forecasts, project analyses, working papers, charts, expense account reports, ledgers, journals, financial statements, statements of account, calendars, appointment books, diaries, drawings, drafts, photographs, sound recordings, tape recordings, videotapes, electronic recordings, magnetic recordings or magnetic storage (including computer media of floppy disks or hard disks or tapes), computer logs, computer print outs, computer documents, or any other tangible tning which constitutes, contains or pertains to matters within the scope of Rule 1001 of the Federal Rules of Evidence. The term "document" also means originals, duplicates, and copies of all of the above upon which notations in writing, print or otherwise have been made which do not appear on the originals.

b. The following categories each include all attachments to the specifically described documents, and all envelopes, explanatory notes or memorandums, and all material that accompanied the document. If the specific document elicited a response, that response is included in the category. If the document itself is was a response, the document to which it is responding is included in the category.

c. The singular shall be deemed to include the plural, and vice versa so as to bring within the scope of this request all documents which might otherwise be construed to be outside its scope.

d. All documents shall be segregated in accordance

with the numbered paragraphs herein.

e. "Subject aircraft" refers to that certain Cessna 340A, Mexican Registration No. XA-KOA, Serial No. 978, which crashed near the U.S. - Mexican border, in San Diego County, California on September 30, 1987.

f. The time for which responses are requested is January 1, 1985 to the date of your response to this request, unless otherwise indicated.

CATEGORIES OF DOCUMENTS

1. Documents pertaining to Japanese individuals traveling to Mexico from March 1, 1987 through December 31, 1987, including:

(a) the inter-company account between Exportadora and Mitsubishi Corp. or any of its subsidiary or related companies (collectively "Mitsubishi" herein);

(b) hotel reservations;

(c) Exportadora's account with the Westgate Hotel;

(d) travel plans, providing of transportation for, or providing of accommodations for, Japanese individuals traveling to Mexico;

(e) telex messages.

2. Documents pertaining to communications with Mitsubishi about the sponsorship of the agricultural project (the "agricultural project"), including communications about transportation or accommodations for the Japanese passengers, whose survivors are the plaintiffs, from January 1, 1987 through December 31, 1987.

3. Documents pertaining to the purchasing by Exportadora of pumps, pump parts, maintenance and services from Prime Pump Company ("Prime Pump") from

January 1, 1987 to date, including invoices, purchase orders and communications about purchasing.

4. Documents concerning the travel arrangements, if any, and accommodations, if any, for each passenger for their trip from San Diego to Guerrero Negro, and from Guerrero Negro to San Diego, in September 1987, including documents received by Exportadora, documents created by Exportadora, and documents requesting that transportation be provided to the passengers.

5. Documents concerning meetings, if any, between each of the passengers and employees of Exportadora.

6. Documents that pertain to any assistance by the government of Mexico to the agricultural project.

7. Documents pertaining to any request and/or instruction by the government of Mexico to Exportadora to assist the agricultural project, including documents pertaining to any request and/or instruction to Exportadora to provide transportation or accommodations to people traveling to the agricultural project.

8. Documents pertaining to reimbursement paid to Exportadora for Exportadora's assistance to the agricultural project.

9. Documents concerning the purposes of the agricultural project.

10. Documents concerning the charter agreement between Exportadora and the charter air company, Aviones De Sonora, S.A. (herein "Aviones"), and communications with the charter air carrier pertaining to the flight, for the flight of September 30, 1987.

11. Documents concerning items sent by Exportadora on the chartered airplane on the morning of September 30, 1987.

12. Documents concerning refueling, if any, of the airplane at Guerrero Negro.

13. Documents concerning the reason the Exportadora airplane was sent to Mexico City and was not available for the flight on the morning of September 30, 1987.

14. Documents concerning communications to the passengers that a chartered airplane would be used for the return flight to Tijuana instead of the Exportadora corporate airplane.

15. Documents concerning the weather on the night of September 29, 1987 in Guerrero Negro, and the location of the chartered airplane during the night of September 29, 1987.

16. Documents concerning information about the weather in Tijuana obtained by the pilot in Guerrero Negro the morning of September 30, 1987.

17. Documents concerning preflight instructions, if any, from Exportadora to the pilot of the chartered airplane.

18. Photographs of the chartered airplane on the morning of September 30, 1987 before it departed Guerrero Negro.

19. Documents pertaining to the airplane accident,

including photographs of the scene of the accident in San Diego.

20. Documents concerning the removal by Exportadora of the San Diego office of Exportadora from the State of California, including documents concerning the reorganization of the operations of the San Diego office.

21. Documents concerning the home addresses, telephone numbers, and current employers of the following former employees of the Exportadora San Diego office:

(a) Victor Garcia,
(b) Alicia Gasteleum,
(c) Alejandro Bremer,
(d) Cipriano (warehouseman),
(e) Jesus (warehouseman).

22. Documents concerning agents, consultants, subsidiaries and affiliates employed by Exportadora in the State of California.

23. Documents concerning Exportadora's insurance policies for transportation accidents in September 1987, including insurance policies for Exportadora's own airplane.

Dated: June 21, 1991
Belmont, California

__/s/_____
Robin E. Foor
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[Filed November 21, 1991]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al., Plaintiffs, vs. EXPORTADORA DE SAL, S.A. DE C.V., et al., Defendants.	Consolidated Civil No. 88-1530 R (P) 88-1531 R (P) 88-1532 R (P) 88-1919 R (P) 88-1920 R (P) **ORDER VACATING PROTECTIVE ORDER AND COMPELLING DEPOSITIONS AND PRODUCTION OF DOCUMENTS FROM EXPORTADORA** Date: November 19, 1991 Time: 8:30 a.m. Place: Courtroom 12 Honorable Louisa S. Porter

The plaintiffs' motion to vacate protective order, to

compel attendance at depositions and to compel production of documents came on for a hearing on November 19, 1991 in the above-entitled court, the Honorable Louisa S. Porter presiding. Considering the motion, the materials in support, the opposition, the reply, and the arguments of counsel, the court finds that:

1. There is good cause to vacate the prior protective order.

2. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (the "Hague Evidence Convention") is a permissive supplement to the Federal Rules of Civil Procedure, not a replacement for the Federal Rules. The case of Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 544, 96 L.ed.2d 461, 484, 107 S.Ct. 2542 (1987) sets forth a three-part test of whether to resort to the procedures of the Hague Evidence Convention, requiring " . . . scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to these procedures will prove effective."

3. In the present case, resort to the procedures of the Hague Evidence Convention has proven to be ineffective for discovery in Mexico. The protective order issued in this case required that depositions in Mexico under the procedures of the Hague Evidence Convention be conducted on oral examination, governed by the Federal Rules of Civil Procedure of the United States of America. The recent deposition taken in Hermosillo, Sonora, Mexico, was not governed by the Federal Rules of Civil Procedure. The experience of the parties to this case in attempting to take depositions in Hermosillo shows that the procedures of the Hague Evidence Convention are ineffective.

4. The San Diego area is a legitimate location for depositions in this case, considering the particular facts of

the case. The accident occurred in the San Diego area, some of the witnesses travel to the San Diego area frequently, and defendant Exportadora De Sal, S.A. De C.V. ("Exportadora") does business in San Diego. The Exportadora corporate jet travels regularly each week round-trip from Guerrero Negro to Tijuana, Mexico, near San Diego.

5. The United States Court of Appeals for the Ninth Circuit decided in this case that Exportadora was not engaged in public activity of a governmental nature, but was engaged in commercial activity. Schoenberg v. Exportadora De Sal, S.A. De C.V., 930 F.2d 777 (9th Cir. 1991).

6. Mexican law does not prohibit the taking of depositions from the employees of Exportadora, nor the production of documents from Exportadora, in this case. This case is a private matter under Mexican law, as decided by the opinion of the Ninth Circuit. Fed.R.Civ.P. 44.1.

7. Depositions and the production of documents from Exportadora in this case under the Federal Rules of Civil Procedure may take place either in San Diego or at the American Consulate in Tijuana, Baja California North, Mexico. Accordingly,

IT IS ORDERED, that:

1. The Modified Protective Order issued by this Court on June 18, 1990 is vacated;

2. Exportadora shall produce witnesses noticed for depositions either in San Diego, California or at the American Consulate in Tijuana, before December 16, 1991;

3. Exportadora shall produce the documents requested by plaintiffs either in San Diego, California or at the American Consulate in Tijuana, before December 16, 1991;

4. The depositions shall be on oral examination. The depositions and the production of documents shall proceed according to the Federal Rules of Civil Procedure, and the Federal Rules of Evidence, of the United States of America.

Dated: November , 1991
San Diego, California

/s/
Louisa S. Porter
United States Magistrate

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[Filed December 6, 1991]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al.,	Consolidated Civil No. 88-1530 R (P)
	88-1531 R (P)
	88-1532 R (P)
	88-1919 R (P)
Plaintiffs,	88-1920 R (P)
vs.	**NOTICE OF TAKING THE DEPOSITIONS OF JUAN BREMER, ISAMU HINA, AND EXPORTADORA DE SAL, S.A. DE C.V.**
EXPORTADORA DE SAL, S.A. DE C.V., et al.,	
Defendants.	

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT the plaintiffs will take the depositions of the following witnesses on the dates and times stated, pursuant to Rule 30 of the Federal Rules of Civil Procedure, at the offices of Greco & Traficante, 750 "B" Street, Suite 2740, San Diego, CA 92112-0670. The depositions will take place before a person authorized to administer oaths, and authorized to transcribe depositions, and shall continue from day to day, excluding weekends and holidays, until completed or continued.

Witness	Date and Time of Deposition
Exportadora De Sal, S.A. De C.V.	December 12, 1991 9:00 a.m.
Juan Bremer	December 13, 1991 9:00 a.m.
Isamu Hina	December 13, 1991 2:00 p.m.

Exportadora De Sal, S.A. De C.V. ("Exportadora") is required, under Rule 30(b)(6) of the Federal Rules of Civil Procedure, to designate a person or persons to testify concerning the following subjects:

(1) the travel arrangements for the passengers;
(2) the chartering of the airplane;
(3) the loading of the airplane;
(4) the preflight instructions to the pilot;
(5) the information given to the pilot about the weather; and,
(6) the agricultural project.

Exportadora is required, under Rule 30(b)(5) and

Rule 34 of the Federal Rules of Civil Procedure to produce the following categories of documents at the depositions:

1. Documents pertaining to Japanese individuals traveling to Mexico from March 1, 1987 through December 31, 1987, including:

(a) the inter-company account between Exportadora and Mitsubishi Corp. or any of its subsidiary or related companies (collectively "Mitsubishi" herein);

(b) hotel reservations;

(c) Exportadora's account with the Westgate Hotel;

(d) travel plans, providing of transportation for, or providing of accommodations for, Japanese individuals traveling to Mexico;

(e) telex messages.

2. Documents pertaining to communications with Mitsubishi about the sponsorship of the agricultural project (the "agricultural project"), including communications about transportation or accommodations for the Japanese passengers, whose survivors are the plaintiffs, from January 1, 1987 through December 31, 1987.

3. Documents pertaining to the purchasing by Exportadora of pumps, pump parts, maintenance and services from Prime Pump Company ("Prime Pump") from January 1, 1987 to date, including invoices, purchase orders and communications about purchasing.

4. Documents concerning the travel arrangements, if any, and accommodations, if any, for each passenger for their trip from San Diego to Guerrero Negro, and from Guerrero Negro to San Diego, in September 1987, including documents received by Exportadora, documents created by Exportadora, and documents requesting that transportation be provided to the passengers.

5. Documents concerning meetings, if any, between each of the passengers and employees of Exportadora.

6. Documents that pertain to any assistance by the government of Mexico to the agricultural project.

7. Documents pertaining to any request and/or instruction by the government of Mexico to Exportadora to assist the agricultural project, including documents pertaining to any request and/or instruction to Exportadora to provide transportation or accommodations to people traveling to the agricultural project.

8. Documents pertaining to reimbursement paid to Exportadora for Exportadora's assistance to the agricultural project.

9. Documents concerning the purposes of the agricultural project.

10. Documents concerning the charter agreement between Exportadora and the charter air company, Aviones De Sonora, S.A. (herein "Aviones"), and communications with the charter air carrier pertaining to the flight, for the flight of September 30, 1987.

11. Documents concerning items sent by Exportadora on the chartered airplane on the morning of September 30, 1987.

12. Documents concerning refueling, if any, of the airplane at Guerrero Negro.

13. Documents concerning the reason the Exportadora airplane was sent to Mexico City and was not available for the flight on the morning of September 30,

1987.

14. Documents concerning communications to the passengers that a chartered airplane would be used for the return flight to Tijuana instead of the Exportadora corporate airplane.

15. Documents concerning the weather on the night of September 29, 1987 in Guerrero Negro, and the location of the chartered airplane during the night of September 29, 1987.

16. Documents concerning information about the weather in Tijuana obtained by the pilot in Guerrero Negro the morning of September 30, 1987.

17. Documents concerning preflight instructions, if any, from Exportadora to the pilot of the chartered airplane.

18. Photographs of the chartered airplane on the morning of September 30, 1987 before it departed Guerrero Negro.

19. Documents pertaining to the airplane accident, including photographs of the scene of the accident in San Diego.

20. Documents concerning the removal by Exportadora of the San Diego office of Exportadora from the State of California, including documents concerning the reorganization of the operations of the San Diego office.

21. Documents concerning the home addresses, telephone numbers, and current employers of the following former employees of the Exportadora San Diego office:

(a) Victor Garcia,
(b) Alicia Gasteleum,
(c) Alejandro Bremer,
(d) Cipriano (warehouseman),
(e) Jesus (warehouseman).

22. Documents concerning agents, consultants, subsidiaries and affiliates employed by Exportadora in the State of California.

23. Documents concerning Exportadora's insurance policies for transportation accidents in September 1987, including insurance policies for Exportadora's own airplane.

Dated: December 4, 1991
Belmont, California

___/s/_____
Robin E. Foor
Attorneys for Plaintiffs

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[Filed January 15, 1992]

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DOREEN S. SCHOENBERG, et al., Plaintiffs,	Consolidated Civil No. 88-1530R(P) 88-1531R(P) 88-1532R(P) 88-1919R(P) 88-1920R(P)
vs.	**ORDER COMPELLING DISCOVERY AND**
EXPORTADORA DE SAL, S.A. DE C.V., et al., Defendants.	**DETERMINING DISCOVERY SCHEDULING** Date: December 19, 1991 Time: 11:00 a.m. Place: Courtroom 12 Honorable Louisa S. Porter

A discovery conference was held to discuss discovery disputes, on December 19, 1991 at 11:00 a.m. in the above-entitled court, the Honorable Louisa S. Porter presiding. Considering the issues presented, good cause appearing,

IT IS ORDERED that:

1. This Court confirms the order of Judge Gonzalez of August 24, 1990.

2. Under the order of August 24, 1990, defendant Exportadora De Sal, S.A. De C.V. ("Exportadora") was compelled to produce:

"1. All documents pertaining to Japanese individuals traveling to Mexico from March 1, 1987 through December 31, 1987, including:

(a) the inter-company account between Exportadora and Mitsubishi Corp. or any of its subsidiary or related companies (collectively "Mitsubishi" herein);

(b) hotel reservations;

(c) Exportadora's account with the Westgate Hotel:

(d) travel plans, providing of transportation for, or providing accommodations for Japanese individuals traveling to Mexico;

(e) telex messages."

3. The law firm of Greco & Traficante, counsel of record for Exportadora, is ordered to diligently search for, and to produce by January 13, 1992, additional documents that have not been produced, responsive to the above-quoted language of the order of August 24, 1990, including, but not limited to:

(a) hotel reservations, hotel bills, and Exportadora's account with the Executive Hotel;

(b) passenger manifests, passenger lists, company airplane schedules, travel plans and telex messages;

(c) schedules for the company airplane to destinations other than Tijuana or Guerrero Negro, such as Mexico City;

(d) documents pertaining to a meeting of the Board of Directors of Exportadora on or about September 30, 1987.

4. Exportadora shall produce all documents pertaining to a meeting of the Board of Directors of Exportadora on or about September 30, 1987, including:

(a) schedules for the meeting, and notices sent to anyone concerning the meeting;

(b) schedules, passenger lists, and documents pertaining to travel on the company airplane, for travel to or from the city where the meeting was held, on or about the time of the meeting (September 22, 1987 through October 3, 1987);

(c) memoranda concerning the scheduling of the meeting, or travel to or from the city where the meeting was held;

(d) telexes or letters concerning the scheduling of the meeting, or travel to or from the city where the meeting was held;

(e) Exportadora need not produce the minutes of the meeting.

5. If the company airplane was sent to Mexico City on or about September 29, 1987 while a Board of Director's meeting was being held in Mexico City on or about that date, then the Court finds that plaintiffs have requested the foregoing documents in item 13 of the request for documents that accompanied the notice of taking the deposition of Juan Bremer of December 4, 1991.

6. Counsel for Exportadora shall produce the documents as stated in this order with delivery by overnight mail to plaintiffs by January 13, 1992. Counsel for Exportadora shall file a declaration with the Court by January 13, 1992, signed by an officer of Exportadora, stating that no

other documents have been found responsive to this order, following a diligent search of Exportadora's files.

7. If it is discovered after the filing of the declaration that other responsive documents, as to any category of documents in this order, have not been produced by Exportadora, this Court shall consider an order to show cause for sanctions, including issue sanctions, against Exportadora.

8. Counsel for Exportadora has stated that document 000047, dated Noviembre 2, 1987, is the only document pertaining to expenses associated with the accident and that it is also the document referred to by Ms. Gastelum in her deposition. Counsel for Exportadora shall file a declaration with the Court by January 13, 1992, signed by an officer of Exportadora, stating that document 000047 is the only document responsive to the request, and stating that after a diligent search no other documents have been found concerning reimbursement from Mitsubishi for the expenses of the accident.

9. Plaintiff's request to resume the deposition of Mr. Bremer is denied.

10. Plaintiffs may take the deposition of Mikiko Izumi on the subject of the declaration she has filed in support of Exportadora's motion for summary judgment.

11. Plaintiff's request to take the deposition of Enrique Achoy, by Exportadora producing Mr. Achoy, is denied. Exportadora does not employ or control Mr. Achoy. This denial is without prejudice to plaintiffs taking Mr. Achoy's deposition on an independent basis.

12. Exportadora may take the deposition of any witness who files a declaration in opposition to the motion for summary judgment, limited to new material stated in

the declaration.

13. Exportadora's request to again depose Mrs. Schoenberg and Mrs. Hernandez is denied.

14. Exportadora's request to depose the Japanese plaintiffs before December 30, 1991 is denied. This Court re-affirms Judge McCue's order of March 6, 1991. The depositions of the Japanese plaintiffs may not be taken until one week before the trial in the United States.

15. The parties shall designate their experts by December 30, 1991.

16. The depositions of experts shall be completed by January 15, 1992.

Dated: January 13, 1992
San Diego, California

__/s/_____
Louisa S. Porter
United States Magistrate

Approved as to form:
GRECO & TRAFICANTE

_/s/_____12-30-91_
Clyde Greco
Attorneys for Defendant
Exportadora De Sal, S.A. De C.V.

I, Lydia Coderre, a duly appointed translator for the Superior Court of California, County of San Diego, CERTIFY that I have translated the following document(s):

Re: DECREE OF PROMULGATION OF AGREEMENT ON TECHNICAL COOPERATION BETWEEN THE GOVERNMENT OF MEXICO AND THE GOVERNMENT OF JAPAN THE PREAMBLE AND ARTICLE XII

from the Spanish Language to the English Language and do CERTIFY that it is correct to the best of my ability and belief.

Lydia Coderre

LYDIA CODERRE
CERTIFIED SPANISH
INTERPRETER

November 15, 1994
Date

INTERPRETER'S CERTIFICATION RE: DOCUMENT TRANSLATION

DECREE of promulgation of the Agreement on Technical Cooperation between the Government of the United Mexican States and the Government of Japan, signed in the city of Tokyo the 2nd of December of 1986.

At margin a stamp with the National Shield which says: United Mexican States.- Presidency of the Republic.

MIGUEL DE LA MADRID II., President of the United Mexican States, to its habitants, makes known

By Plenipotentiaries duly authorized for the effect, was signed in the city of Tokyo on the 2nd day of the month of December of the year one thousand nine hundred eighty six the Agreement on Technical Cooperation between the Government of the United Mexican States and the Government of Japan, whose text and Spanish form are evident in the attached certified copy.

The above Agreement was approved by the Chamber of Senators of the H. Congress of the Union, the twenty second day of the month of October of the year of one thousand nine hundred eighty seven, according to Decree published in the Official Daily of the Federation of the ninth day of the month of December of the same year.

The exchange of notifications foreseen in Article XII of the Agreement was effected in the city of Tokyo, Japan the seventeenth day of the month of December of the year of one thousand nine hundred eighty seven and the twenty eighth day of the month of January of the year of one thousand nine hundred eighty eight.

Therefore, for its due observance, in compliance with that provided in the First Fraction of Article Eighty Nine of the

Political Constitution of the United Mexican States, the present Decree promulgated in the residence of the Federal Executive Power on the seventh day of the month of March of the year of one thousand nine hundred eighty eight.-Miguel de la Madrid II.-Rubric.-The Department of Foreign Relations. Bernardo Sepúlveda Amor.-Rubric.

The Attorney Alfonso de Rosenzweig Diaz, Assistant Secretary of Foreign Relations certifies:

That in the archives of this Department there exists one of the two originals of the Agreement on Technical Cooperation between the Government of the United Mexican States and the Government of Japan, signed in the city of Tokyo on the second day of the month of December of the year of one thousand nine hundred eighty six, whose text and Spanish form are the following:

ARTICLE XII

1. The present Agreement shall enter into effect on the date in which the Government of Japan receives written notification from the Government of the United Mexican States that it has complied with the necessary constitutional procedure to put it in practice.

2. The present Agreement shall have a validity of one year and shall be extended automatically each year for another period of equal duration unless one of the Governments has communicated to the other Government, in writing, six months beforehand its will to denounce.

IN WITNESS WHEREOF, the undersigned, duly authorized for this sign the present Agreement.

Executed in the city of Tokyo the second day of the month of December of the year of one thousand nine hundred eighty six in two copies, in the Spanish language and Japanese, both texts being equally valid.-By the Government of the Mexican United States, the Secretary of Foreign Relations, **Bernardo Sepúlveda Amor.**- Rubric.-By the Government of Japan, the Minister of Foreign Relations, Tadashi Kuranari.-Rubric.

The present is true and complete copy in Spanish of the Agreement on Technical Cooperation between the Government of the United Mexican States and the Government of Japan, signed in the city of Tokyo on the second day of the month of December of the year of one thousand nine hundred eighty six.

I issue the present, in eleven useful pages in Mexico City, Federal District, on the first day of the month of March of the year of one thousand nine hundred eighty eight for the purpose of incorporating it to the respective Decree of promulgation.-The

Assistant Secretary of Foreign Relations, Alfonso de Rosenzweig-Diaz.-Rubric.